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Nos. 84-902, 84-922 and 84-1041

In the Supreme Court of the United States

OCTOBER TERM, 1985

WARDAIR CANADA INC., APPELLANT

v.

FLORIDA DEPARTMENT OF REVENUE

LINEAS AEREAS COSTARRICENSES, S.A., ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

AIR JAMAICA LIMITED, ET AL., APPELLANTS

v.

FLORIDA DEPARTMENT OF REVENUE

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a Florida sales tax on aviation fuel, as applied to fuel purchased by foreign airlines for use exclusively in international traffic, unconstitutionally impairs the power of the federal government to regulate foreign commerce.

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This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the Florida Supreme Court in No. 84-902 (J.S. App. A1-A7) is reported at 455 So. 2d 326. The opinion of the Florida Supreme Court in No. 84-922 (J.S. App. 1a-2a) is unreported. The opinion of the Florida Supreme Court in No. 84-1041 (J.S. App. 28-30) is reported at 455 So. 2d 324. The opinions of the

Leon County Circuit Court (84-902 J.S. App. A21-A24; 84-922 J.S. App. 38a-50a; 84-1041 J.S. App. 31-36) are unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered in each case on June 14, 1984. Timely motions for rehearing were denied in each case on September 12, 1984 (84-902 J.S. App. A38; 84-922 J.S. App. 71a; 84-1041 J.S. App. 95). Notices of appeal in the Florida Supreme Court were filed respectively on November 15, 1984 (84-902 J.S. App. A39-A41), on November 14, 1984 (84-922 J.S. App. 73a-75a), and on November 28, 1984 (84-1041 J.S. App. 98-100). The jurisdictional statement in No. 84-902 was filed on December 5, 1984, and the jurisdictional statements in Nos. 84-922 and 84-1041 were filed on December 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). Review lies by way of appeal where, as here, a state court has held a state tax statute applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 441 (1979).

STATEMENT

1. Appellants in these three cases are 19 airlines established under the laws of foreign countries and having their principal places of business outside the United States. The nations in which they are domiciled are located in North America (Canada and Mexico), Central America (Costa Rica, El Salvador and Honduras), South America (Argentina, Brazil, Colombia, Ecuador, Guyana and Peru), and the Caribbean (Barbados, Jamaica, and Trinidad & Tobago). Each appellant has been found by the Civil Aeronautics Board to be owned and effectively controlled by the government or nationals of its home country. About half the appellant airlines

are wholly owned[1] or substantially owned[2] by the governments of the nations in which they are domiciled.

Each appellant has been designated by its home country to provide international air transportation to and from the United States. Aviation relations between the United States and appellants' home countries are governed inter alia by a multilateral aviation agreement commonly known as the Chicago Convention (Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.*). In addition, all of the appellants' home countries, except Honduras, have entered into bilateral executive agreements with the United States respecting air transportation services.[3] Pursuant to these agreements (or, in the case of Honduras, pursuant to CAB authorization (84-922 J.S. App. 43a)), appellants fly only on routes between their home countries and specified cities, called "gateways," in the United States (*ibid.*). Appellants engage in no intrastate or interstate flights within this country, and

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[1] Aerolineas Argentinas, for example, is 100% owned by the Government of Argentina, Aeromexico by the Government of Mexico, Ecuatoriana by the Government of Ecuador, BWIA International by the Government of Trinidad & Tobago, and Varig by the Government of Brazil (84-922 J.S. App. 76a-79a).

[2] Mexicana, for example, is substantially owned by the Government of Mexico, Air Jamaica by the Government of Jamaica, Caribbean Air Cargo by the Government of Barbados, and Guyana Airways by the Government of Guyana (84-922 J.S. App. 77a; 84-1041 J.S. 17).

[3] After the Florida trial court entered judgment in these cases, the bilateral aviation agreements with three of appellants' home countries—Argentina, Brazil, and Peru—terminated. Negotiations toward new agreements have commenced, and it is not expected that the tax provisions of the new agreements, if any, will differ appreciably from those of their predecessors. For the sake of simplicity, we will in this brief generally refer to the relevant provisions of the bilateral agreements as they existed when the trial court rendered its decisions.

their operations here are thus exclusively in foreign commerce. See 49 U.S.C. App. 1508(b).

Each appellant operates to and from Miami, Florida, which is the primary domestic gateway for flights between the United States and South America, Central America, and the Caribbean, as well as a major stop for flights between this country and Europe. Appellants regularly purchase significant quantities of aviation jet fuel at Miami International Airport. This fuel is not purchased for export, but is consumed by appellants' airplanes in international commerce en route from Miami. Appellants are exempt from federal taxes on this aviation fuel by virtue of explicit provisions in the bilateral aviation agreements between the United States and their home countries, or, absent such provisions, by virtue of reciprocal tax exemptions provided to American carriers by appellants' home country governments.

2. For many years, Florida has imposed a sales tax on fuel purchased by common carriers, including airlines, within that State. This levy is an excise tax, not a user fee (84-922 J.S. App. 52a). The tax is technically imposed on the fuel supplier, but the supplier is required to pass the tax on to the purchaser (Fla. Stat. Ann. § 212.62(2) (West Supp. 1985)). Thus, the carrier bears the economic incidence of the tax.

Prior to April 1, 1983, Florida's sales tax on fuel, as it applied to all carriers, was prorated on a mileage basis. That is, a carrier paid only that portion of the otherwise-payable tax that represented the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year. Fla. Stat. Ann. § 212.08(4) (West 1971). The Florida Supreme Court stated some years ago that this proration formula was designed "to prevent the State from exceeding its powers to tax interstate and foreign commerce" by ensuring that "Florida would only tax that portion of commerce activity that occurred within

the State." *Tropical Shipping & Construction Co.* v. *Askew,* 364 So. 2d 433, 435 (1978). Because appellants, following normal airline routes, travel only briefly in Florida air space, they and other foreign airlines paid little or no Florida fuel tax prior to April 1, 1983 (84-922 J.S. 3).

Effective April 1, 1983, the Florida Legislature substantially amended its fuel tax regime. The amendment most pertinent here was that repealing the mileage proration formula for airlines, while leaving it in effect for railroads engaged in interstate commerce and for vessels engaged in interstate or foreign commerce. Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985). As a result, airlines, including foreign airlines like appellants, are now taxed on all aviation fuel they purchase in Florida, even though that fuel is used exclusively in foreign commerce (84-922 J.S. App. 53a).[4]

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[4] Florida recently enacted, effective July 1, 1985, further amendments to its scheme of aviation fuel taxation. 1985 Fla. Laws 85-348, § 9. While exempting aviation fuel from sales tax, those amendments impose a new excise tax specifically on aviation fuel. *Id.* §§ 2, 3. The amount of the levy (5.7 cents per gallon) is virtually the same as under the version of the law here challenged (5% of a deemed price of $1.148 per gallon). Compare 1985 Fla. Laws 85-348, § 2, with Fla. Stat. Ann. § 212.62(3)(c) (West Supp. 1985). However, rather than applying (as did the sales tax) only to aviation fuel purchased in Florida (see Fla. Stat. Ann. § 212.08(4)(a)(2) (West Supp. 1985)), the new excise tax applies to "aviation fuel sold in this state, *or brought into this state for use*" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9825) (emphasis added)). A refund of the new excise tax is to be allowed "not [to] exceed six-tenths of one percent of the wages paid by the carrier to employees located or based within this state" (1985 Fla. Laws 85-348, § 2 (to be codified at Fla. Stat. § 206.9855)). This refund provision, of course, will provide virtually no tax relief to foreign airlines like appellants, which typically have few if any employees based in Florida. Enactment of these amendments, which apply only prospectively (1985 Fla. Laws 85-348, § 9)), does not moot the instant appeals, which continue to present a live controversy concerning appellants' sales tax liability from April 1, 1983, to July 1, 1985.

3. Appellants brought these actions in the Leon County Circuit Court seeking declaratory and injunctive relief against the application of Florida's sales tax to them. Their principal contention was that the tax, as applied to aviation fuel used by foreign airlines in foreign commerce, is inconsistent with federal aviation policy, particularly as that policy is expressed in multinational and bilateral agreements executed by the United States and appellants' home countries. Appellants accordingly contended that Florida's tax, as applied, is unconstitutional under the Supremacy Clause and the Foreign Commerce Clause. See *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979).[5]

The circuit court did not explicitly declare Florida's aviation fuel tax unconstitutional. See 84-902 J.S. App. A23-A24; 84-922 J.S. App. 47a-48a; 84-1041 J.S. App. 35-36. However, the court found that the tax, as applied to appellants, was "inconsistent with the undertakings of the United States government in [its] international bilateral agreements," and it accordingly "recognize[d] an exemption from the fuel tax for [those] foreign

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[5] A number of domestic airlines likewise brought suits challenging Florida's sales tax on aviation fuel, predicating their challenges chiefly on the Due Process Clause, the Equal Protection Clause, and the Interstate Commerce Clause. The Florida courts largely rejected those challenges, and appeals raising those questions are now pending in this Court. *Northeastern International Airways, Inc. & Arrow Air, Inc.* v. *Florida Department of Revenue,* No. 84-921; *Eastern Airlines Inc.* v. *Florida Department of Revenue,* No. 84-926; *Delta Airlines, Inc.* v. *Florida Department of Revenue,* No. 84-929. The Court has invited our views in those cases, and a brief expressing those views is being filed contemporaneously herewith. To the extent that the foreign airlines in the instant appeals replicate arguments made by the domestic airlines—arguments that the Florida courts rejected, relying on the decisions mentioned above (84-902 J.S. App. A2, A23; 84-922 J.S. App. 2a, 39a; 84-1041 J.S. App. 2, 28-29, 32)—we address those arguments in our other brief.

airlines whose governments have entered into executive agreements with the United States * * * or who have been granted Foreign Air Carrier Permits by the United States on a basis of reciprocity and comity" (84-922 J.S. App. 48a, 49a-50a; see 84-902 J.S. App. A23-A24; 84-1041 J.S. App. 36). On that basis, the court granted appellants "a permanent injunction against [the Florida] Department of Revenue from assessing and collecting fuel taxes pursuant to" the challenged statute (84-1041 J.S. App. 36; see 84-902 J.S. App. A22; 84-922 J.S. App. 48a).

The court recognized that this Nation's bilateral aviation agreements, negotiated at various times over a 40-year period, deal with fuel taxes under somewhat differing rubrics, and that none of those agreements explicitly interdicts state or local, as opposed to "national" (viz., federal), taxes on aviation fuel. See 84-902 J.S. App. A23; 84-922 J.S. App. 41a; 84-1041 J.S. App. 33-34. At the same time, however, the court recognized that those agreements evidence a well-settled federal policy favoring "reciprocal tax exemptions" (84-922 J.S. App. 44a), a policy "designed to establish federal uniformity and prevent retaliatory taxes on U.S. carriers," and, by "prevent[ing] any discrimination, * * * to further the free flow of international aviation" (84-902 J.S. App. A22, A23). The court noted that " 'the Federal Government must speak with one voice when regulating commercial relations with foreign governments' " (84-922 J.S. App. 47a, quoting *Japan Line,* 441 U.S. at 449), and that federal aviation authorities over the years have consistently endeavored to persuade foreign nations to eliminate aviation fuel taxes on the basis of reciprocity (84-922 J.S. App. 46a). "[A]llowing the fifty states to impose individual state taxes," the court concluded, "would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce" (*ibid.*).

Upon cross-appeals from the circuit court's judgments, the intermediate appellate court certified the cases directly to the Florida Supreme Court (84-922 J.S. App. 37a), which, in a divided opinion, "reverse[d] the circuit court's order to the extent that it recognized an exemption from the excise tax for the foreign airlines" (*id.* at 2a; 84-902 J.S. App. A6; 84-1041 J.S. App. 30). The Florida Supreme Court initially rejected appellants' argument, based on the Supremacy Clause, that Florida's tax was preempted by the federal bilateral agreements. The court believed that those agreements "clearly express an intent to apply to only national taxes and duties," and the court "d[id] not believe that the scheme of [those] agreement[s] is so pervasive as to permit the reasonable inference that Congress intended to preclude the state's power to tax" (84-902 J.S. App. A5; see 94-922 J.S. App. 2a; 84-1041 J.S. App. 28-29).

The court then addressed appellants' argument that Florida's tax, as applied to them, violates the Foreign Commerce Clause as interpreted by this Court in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434 (1979). This Court there held that a state tax on the instrumentalities of foreign commerce is invalid if it either "creates a substantial risk of international multiple taxation" or "prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign Governments" (441 U.S. at 451 (original quotation marks omitted)). The Florida Supreme Court noted that "the first requirement of *Japan Line* was not a concern [here] because there had been no de facto showing of multiple taxation or substantial risk of the same" in the instant cases (84-902 J.S. App. A6). Disagreeing with the trial court, however, it also held that Florida's tax satisfies the second requirement of *Japan Line,* emphasizing that the

federal bilateral agreements explicitly address only national duties and charges and "do[ ] not provide for exemptions from state excise taxes." The court "presume[d] this has been done intentionally" and concluded that Florida's tax accordingly does not "prevent[ ] our federal government from speaking with one voice" (84-902 J.S. App. A6).

Justice Overton, joined by Justice McDonald, dissented. They contended that "the individual states of this country are precluded by [the federal bilateral] agreements from taxing fuel used by foreign airlines," noting that, under the majority's holding, "United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries" (84-902 J.S. App. A7). The dissenting justices thus concluded that Florida's tax, as applied to appellants, violates the Supremacy Clause and the Foreign Commerce Clause.

DISCUSSION

This Court held in *Japan Line* that the Commerce Clause commits to the exclusive authority of the federal government the regulation of those aspects of foreign commerce which by their very nature require uniform national treatment. In our view, the imposition of levies and charges on airplane equipment and supplies, including aviation fuel, used by foreign airlines exclusively in international traffic is an aspect of foreign commerce that shares this nature. Florida's tax, as applied to appellants, is inconsistent with strongly-articulated federal policy in this area and with accepted international practice. The tax, as thus applied, should be invalidated.

A. The Federal Government Is Committed To A Policy Of Reciprocal Tax Exemptions For Fuel And Supplies Used By Foreign Airlines In Foreign Commerce, And This Policy Represents The Established Practice Of Nations In The Aviation Field

This Nation's aviation relations with foreign governments are implemented through a comprehensive network of treaties, bilateral executive agreements, informal arrangements, and federal statutory provisions. The pattern produced by these varied strands, a pattern to which the federal government has long been committed, is one of reciprocal tax exemptions for aircraft, equipment and supplies, including aviation fuel, that constitute the instrumentalities of international air traffic. Due in part to our Nation's advocacy, this pattern has become the accepted international norm in the aviation field, a consensus that reflects the longstanding custom of nations in international maritime trade.

1. The United States and 156 other nations, including all of appellants' home countries, are parties to the Chicago Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 61 Stat. 1180 *et seq.* That Convention binds its signatories to implement various measures to facilitate air transportation (arts. 22-28, 61 Stat. 1186-1188). One of these measures, set forth in Article 24(a), provides that aircraft engaged in international traffic, as well as "[f]uel, lubricating oils, spare parts, regular equipment and aircraft stores on board [such] an aircraft," shall, upon arrival in a contracting state, "be exempt from customs duty, inspection fees or similar national *or local* duties and charges" (61 Stat. 1186 (emphasis added)).

Article 24(a) explicitly applies only to aviation fuel and supplies which are "on board an aircraft * * * on arrival * * * and retained on board on leaving" a given

country (61 Stat. 1186). Consistently with the purposes of the Chicago Convention, however, Article 24(a)'s policy of reciprocal exemptions has been accorded much broader scope. As a party to the Convention, the United States is a member of the International Civil Aviation Organization (ICAO), which was established by the Convention (arts. 43-66, 61 Stat. 1192-1200) to "[a]void discrimination among contracting States" and to "[p]romote generally the development of all aspects of international civil aeronautics" (art. 44, 61 Stat. 1193). During 1948-1951, the Air Transport Committee of ICAO, recognizing that the Convention "did not attempt to deal comprehensively with tax matters," undertook a "comprehensive study of the various existing and anticipated problems related to taxation in the field of international air transport." *ICAO's Policies on Taxation in the Field of International Air Transport,* ICAO Doc. 8632-C/968, at 1 (Nov. 1966) [hereinafter cited as *ICAO Policies*]. Upon completion of that study, the ICAO Council in 1951 adopted resolutions designed "to reduce to the fullest possible extent all forms of taxation on the sale or use" of the instrumentalities of air traffic (*id.* at 2).

During 1965-1966, ICAO exhaustively reviewed the responses of the Chicago Convention's contracting states to the 1951 resolutions. It found that "it is the common practice of many States with respect to ships and aircraft engaged in international navigation" not only "to exempt from taxation all fuel and lubricants on board on arrival" in a given territory, but also, "on a basis of reciprocity, to exempt from or refund taxes on fuel and lubricants taken on board at the final port of call in that territory." *ICAO Policies* 3. And ICAO found it desirable "to extend such exemptions or refunds to other consumable technical supplies, which, like fuel and lubricants, * * * are consumed during flight and are essential for that purpose" (*ibid.* (footnote omitted)).

Consistently with these findings, the ICAO Council adopted, on November 14, 1966, the following Resolution (*ICAO Policies* 3):

> [F]uel, lubricants and other consumable technical supplies taken on board [an aircraft] for consumption during [an international] flight shall be furnished exempt from all customs and other duties or, alternatively, any such duties levied shall be refunded * * *.

The Resolution defined "customs and other duties" to include "import, export, excise, sales, consumption and internal duties and taxes of all kinds levied upon the fuel, lubricants and other consumable technical supplies *by any taxing authority within a State*" (*id.* at 4 (emphasis added)).

The ICAO Council explained that this Resolution "endorsed the policy of reciprocal exemption" from taxes on aviation fuel used in international commerce, and that it reflected "longstanding maritime practice and the established policy of many States" (*ICAO Policies* 5). It noted that the policy of reciprocal tax exemptions had been "incorporated in the 1939 London Convention concerning Exemption from Taxation for Liquid Fuel and Lubricants Used in Air Traffic," a convention which had been "signed by representatives of 38 States" but which "never came into force as many of the signatories shortly thereafter found themselves at war" (*id.* at 1, 5). And the ICAO noted "the obvious practical difficulties inherent in adopting any other course," concluding that a policy of reciprocal tax exemptions by all taxing jurisdictions was "the only [course] available in the foreseeable future which would, in a simple and effective manner, assure equitable treatment for international aviation" (*id.* at 5).

Virtually all nations party to the Chicago Convention have substantially implemented the 1951 and 1966

ICAO Resolutions, and, accordingly, grant aviation fuel purchased by foreign airlines for use in international traffic a complete exemption from taxes, including sales, use, and excise taxes, regardless of whether such taxes are levied by the national government or by its political subdivisions.[6] The nations granting such across-the-board exemptions include most of our trading partners (such as Australia, China, Denmark, the Federal Republic of Germany, Greece, Japan, the Netherlands, Switzerland, and the United Kingdom), and most of the nations in which appellants are domiciled. The sole exception appears to be Canada, whose provinces impose taxes on aviation fuel and, like Florida, generally do not grant an exemption for fuel purchased by foreign airlines for use in foreign commerce. With that exception, however, the policy of reciprocal tax exemptions by all taxing authorities represents uniform international practice.

2. In the 38 years since the Chicago Convention came into force, the United States has signed bilateral aviation agreements with more than 70 foreign countries. Whereas the Convention itself is a treaty ratified by the Senate (see 61 Stat. 1180), these bilateral undertakings are typically executive agreements. They extend, with varying degrees of explicitness, a bilateral commitment parallel to that expressed multilaterally in Article 24(a) of the Chicago Convention and in ICAO's implementing Resolutions.

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[6] A few nations (such as France) appear to limit their reciprocal exemption policy to commercial aircraft, as opposed to private airplanes. We are informed by the State Department that political subdivisions in India have legal authority to impose sales taxes on aviation fuel. However, in response to a directive from the central government, all Indian states to which United States airlines fly currently exempt fuel uplifted by international carriers from sales tax.

Almost all our bilateral agreements obligate the United States to "exempt the designated * * * airlines of the other Contracting Party to the fullest extent possible under [our] national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants" and other equipment and supplies used in international air service.[7] Several agreements accomplish the same result by binding the United States to accord airlines of the other contracting party, with respect to taxes on aviation fuel and supplies, "treatment not less favourable than that granted to * * * carriers of the most favoured nation."[8] Some of the earlier compacts, like Article 24(a) of the Chicago Convention, expressly refer only to aviation fuel and supplies "introduced into" the United States or "retained on board [the] aircraft * * * upon arriving in or leaving" this country.[9] The more modern agreements,

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[7] Air Transport Services Agreement, Oct. 2, 1969, United States-Jamaica, art. 8(A), 20 U.S.T. 2966, *reprinted at* 84-1041 J.S. App. 101. See, *e.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a; Air Transport Services Agreement, Oct. 24, 1956, United States-Columbia, art. 7, 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[8] Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a (governing aviation relations with Guyana and Trinidad & Tobago). See, *e.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a; Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

[9] Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b) and (c), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a. See, *e.g.*, Air Transport Services Agreement, Dec. 27, 1946, United States-Peru, art. 3(b) and (c), 61 Stat. 2587, *reprinted at* 84-1041 J.S. App. 113.

however, follow the 1951 and 1966 ICAO Resolutions by extending the reciprocal exemption privilege explicitly to cover items "supplied in" this country,[10] that is, aviation fuel and supplies "taken on board aircraft of the carriers of [the other] Contracting Party in the territory of the [United States] and intended solely for use in international air services."[11]

In according reciprocal exemptions for aviation fuel taken on board foreign aircraft within this country, our bilateral agreements typically refer to "national duties and charges,"[12] charges "imposed by the national authorities,"[13] or "federal taxes."[14] Some agreements refer to duties or charges "imposed by the * * * Contracting Party,"[15] others to "national duties or charges

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[10] Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(2)(a) and (c), *reprinted at* 84-922 J.S. App. 87a-88a. See, *e.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(2)(a) and (c), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

[11] Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1)(c), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58. See, *e.g.*, Air Transport Services Agreement, Oct. 24, 1956, United States-Colombia, art. 7(D), 14 U.S.T. 432, *reprinted at* 84-922 J.S. App. 85a.

[12] *E.g.*, Air Transport Services Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7, 12 U.S.T. 65, *reprinted at* 84-922 J.S. App. 90a-91a.

[13] *E.g.*, Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(1), *reprinted at* 84-922 J.S. App. 87a.

[14] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX, *reprinted at* 84-922 J.S. App. 83a.

[15] *E.g.*, Air Transport Services Agreement, Feb. 11, 1946, United States-United Kingdom, art. 3(2), 60 Stat. 1500, *reprinted at* 84-922 J.S. App. 92a.

[imposed] by the contracting party,"[16] and others simply to "exemption from taxes,"[17] without specifying what taxing jurisdictions are meant to be covered. Exemptions from federal charges are implemented through a host of statutory and regulatory provisions, which accord foreign-owned instrumentalities of air traffic treatment parallel to that accorded foreign-owned instrumentalities of maritime trade.[18]

Unlike our earlier agreements, our most recent bilateral aviation compacts—generally, those dating from 1978 onwards—explicitly address taxes imposed by political subdivisions as well as by the federal government. These agreements typically commit the United States to "use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on [aviation fuel and supplies], except to the extent that the charges are based on the actual cost of providing the service."[19] Such "best efforts" clauses concerning state and local taxes are contained in agreements recently executed or negotiated with 18 foreign nations, including

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[16] *E.g.*, Air Transport Services Agreement, Jan. 8, 1947, United States-Ecuador, art. 3(b), 61 Stat. 2775, *reprinted at* 84-922 J.S. App. 89a.

[17] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[18] See, *e.g.*, 19 U.S.C. 1435 (entry of foreign vessels); 19 C.F.R. Pt. 4 (same); 49 U.S.C. App. 1509(c) (entry of foreign aircraft); 19 C.F.R. Pt. 6 (same); 26 U.S.C. 4221(a)(3), (d)(3) and (e)(1) (exemption from federal excise tax on the basis of reciprocity for fuel and supplies used in international air transport).

[19] *E.g.*, Air Transport Services Agreement, Apr. 8, 1982, United States-Barbados, art. 9(5), T.I.A.S. No. 10370, *reprinted at* 84-1041 J.S. App. 110.

the home countries of four of the appellants here (Barbados, Costa Rica, El Salvador and Jamaica)[20] and such important trading partners as China, the Federal Republic of Germany, Israel, and the United Kingdom.

3. As the above discussion reveals, none of our bilateral aviation agreements explicitly interdicts state or local taxes on aviation fuel used by foreign airlines in international traffic. To that extent, the bilateral agreements do not in terms reflect the full scope of our federal aviation policy, or the full scope of the international consensus evidenced by the 1951 and 1966 ICAO Resolutions, favoring reciprocal tax exemptions by *all* taxing jurisdictions. The reasons for this are largely of an economic and historical, partly of a legal, nature.

State taxation of international aviation has only recently become a matter of international concern. The period immediately following adoption of the Chicago Convention, when our bilateral agreements were first negotiated, coincided with the early days of commercial jet travel, a time when relatively few foreign airlines served the United States and when those that did serve it operated to a mere handful of international gateways here. Most foreign airlines purchased bonded fuel, which, under this Court's decisions (*McGoldrick* v. *Gulf Oil Corp.*, 309 U.S. 414 (1940)), was exempt from state taxes, and which, prior to the 1973 OPEC oil embargo, was both inexpensive and readily available. State taxing authorities thus had little reason to regard international aviation as a potential source of revenue. In those

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[20] See note 19, *supra*; Air Transport Services Agreement, Oct. 20, 1983, United States-Costa Rica, art. 9(5), *reprinted at* 84-922 J.S. App. 88a; Air Transport Services Agreement, Apr. 2, 1982, United States-El Salvador, art. 9(5), T.I.A.S. No. 10488, *reprinted at* 84-1041 J.S. App. 115; Air Transport Services Agreement, Apr. 4, 1979, United States-Jamaica, art. 10(6), T.I.A.S. No. 9613, *reprinted at* 84-1041 J.S. App. 104.

relatively rare instances where state tax laws did (at least theoretically) reach aviation fuel used by foreign airlines, those taxes (like Florida's prior to April 1, 1983) were of the "burn-off" variety, *i.e.*, were prorated on a mileage basis. Since foreign airlines traveled only briefly in such states' air space, they would pay little if any fuel tax in actual practice. Finally, our early aviation agreements were negotiated at a time when the Executive Branch entertained some doubt about its constitutional authority to enter into such compacts, which are typically executive agreements rather than treaties, much less to use them as a vehicle for preempting state laws. The State Department's usual practice, in any event, was to exercise restraint on this score, particularly where (as was until recently true here) state taxes were of little practical concern to our trading partners. See 11 Foreign Affairs Manual § 721.3(b) (Feb. 25, 1985) (State Department guidelines on treaties and other international agreements, or "Circular 175") (citing potential conflict with state law as a factor to be considered in deciding whether to enter into a treaty or an executive agreement).

The field of international aviation has changed dramatically in recent years. The number of foreign airlines serving the United States, and the number of domestic gateways to which they fly, have increased geometrically. See M. Brenner, J. Leet & E. Schott, *Airline Deregulation* 119 (1985). The price of aviation fuel has risen about 700% since the OPEC oil embargo. *Id.* at 106. Bonded fuel, which was once readily available at all gateways, is now available at only one or two.[21] In

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[21] Following the OPEC embargo, the price of bonded fuel, which must be manufactured exclusively from crude oil produced abroad, rose sharply as compared with the price of fuel manufactured from domestic supplies. Subsequently-enacted federal price and allocation regulations (see 15 U.S.C. (1976 ed.) 751 *et seq.*) further

short, the very factors that once made international aviation an unlikely source of state revenue now make it a rather tempting target.

It is thus no accident that our most recent bilateral agreements expressly commit the United States and its contracting partners to use their "best efforts" to ensure exemption from regional and local, as well as national, taxes on aircraft fuel and supplies. Although these provisions stop short of explicitly banning such levies, they are very strong expressions of federal policy on the subject. Indeed, many of our bilateral aviation agreements, in specifying the federal government's obligations generally, use similar executory language, requiring the United States (for example) to grant exemptions from national duties "to the fullest extent possible,"[22] to make "efforts * * * to provide * * * for exemption from taxes,"[23] to "make all possible efforts to ensure * * * exemption from federal taxes,"[24] and to "exercise [its] best efforts" to ensure the availability of various privileges.[25] The Chicago Convention, similarly,

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limited the availability of bonded fuel. Because of its relatively high price and scarcity, foreign carriers, which in 1968 had derived 90% of their fuel from bonded stocks, derived only 4% of their supply therefrom by 1977. See U.S. Dep't of Energy, *Findings and Views Concerning the Exemption of Kerojet Fuels from the Mandatory Petroleum Allocation and Price Regulations* 38-40 (1978). Owing to this shrinkage in demand, the elaborate dedicated delivery and storage systems for bonded fuel, established to meet Customs Service regulations, were dismantled or combined with non-bonded fuel supply networks.

[22] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XII(1), 25 U.S.T. 794, *reprinted at* 84-902 J.S. App. A58.

[23] *E.g.*, Air Transport Services Agreement, Sept. 22, 1977, United States-Argentina, art. F(3), 29 U.S.T. 2801, *reprinted at* 84-922 J.S. App. 82a.

[24] *E.g.*, Air Transport Services Agreement, June 23, 1982, United States-Brazil, art. IX(4), *reprinted at* 84-922 J.S. App. 83a.

[25] *E.g.*, Nonscheduled Air Service Agreement, May 8, 1974, United States-Canada, art. XI(3), XVI(3), 25 U.S.T. 794, 796, *reprinted at* 84-902 J.S. App. A58, A60.

obligates the United States to implement certain measures "to the greatest possible extent" (art. 12, 61 Stat. 1183) or "so far as it may find practicable" (arts. 23, 28, 61 Stat. 1186, 1188). The "best efforts" clauses concerning state and local taxes in our recent bilateral agreements have equal dignity with these provisions, and are properly regarded by foreign nations as expressing a strong federal commitment to the policy of reciprocal tax exemptions by *all* taxing jurisdictions.

4. Federal aviation authorities have made aggressive efforts over the years to implement the policy of reciprocal exemptions both internationally and domestically. Diplomatic steps have regularly been taken to encourage foreign nations to make and, once made, to honor, commitments to accord tax exemptions for aviation fuel used by United States carriers in foreign commerce.[26] In 1982, the State Department received communications from the United Kingdom expressing concern about the imposition of aviation fuel taxes by political subdivisions in this country. The Department thereupon wrote the tax authorities of various states, including Florida, noting that "foreign governments have questioned the appropriateness of imposing [such levies] on foreign air carriers in view of the generally-accepted and longstanding international practice of reciprocally exempting such items" (84-922 J.S. App. 95a). Some nations, the Department noted, "have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines," a result that "would frustrate the inter-

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[26] See, *e.g.*, U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-104 (1977) (discussing steps taken to protest actions by Argentina and Colombia respecting aviation fuel taxes); U.S. Civil Aeronautics Board, *FY 1977 Report to Congress* 108, 109, 112, 114 (1978) (same, actions by Chile, Colombia, Japan, and the Philippines).

national system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation" (*ibid.*). The Department emphasized that this was "an important matter affecting U.S. international relations" and urged state revenue authorities to exempt foreign air carriers, on the basis of reciprocity, "from taxes on aviation fuel and other items for which the federal government grants an exemption" (*id.* at 94a-95a).

Several months later, Florida announced its proposal to extend its aviation fuel tax, effective April 1, 1983, to fuel consumed by foreign airlines in foreign commerce. The State Department again wrote the Florida Department of Revenue, noting that it was "surprised and distressed" to learn of this proposal, and again urging the State to exempt foreign airlines "based on reciprocity" (84-922 J.S. App. 99a). The Department warned that Florida's failure to afford such an exemption "will cause serious foreign relations problems" (*ibid.*).

The foreign relations problems predicted by the State Department quickly materialized. To date, the United States has received diplomatic notes from 25 foreign countries (App., *infra*, 1a-58a) protesting Florida's tax on aviation fuel and similar taxes, enacted or proposed, by Illinois (*id.* at 25a, 36a, 58a) and New York (*id.* at 48a). The protesting governments include many of appellants' home countries, as well as Belgium, France, the Federal Republic of Germany, Iceland, Israel, Italy, Japan, the Netherlands, Norway (on behalf of itself, Denmark, and Sweden), Panama, Spain, Switzerland, the United Kingdom, and Yugoslavia.

The diplomatic notes uniformly point to the "international consensus" (App., *infra*, 10a, 23a, 42a, 44a, 53a) and the "established international practice" (*id.* at 2a, 5a, 8a, 12a, 35a, 40a, 49a) of according reciprocal tax exemptions for aviation fuel used in international traffic. They emphasize that this consensus, as evidenced by

the 1951 and 1966 ICAO resolutions, entails exemption from regional and local, as well as from national, levies (App., *infra*, 2a, 5a, 6a, 8a, 13a, 20a, 23a, 30a, 35a, 37a, 40a, 46a-47a, 48a, 53a). Several foreign governments point out that their political subdivisions do not impose taxes on fuel purchased by United States airlines (*id.* at 1a, 5a, 8a, 13a, 21a, 50a, 53a, 57a), advising that their restraint in this respect is "based on the assumption that the United States will provide reciprocal treatment to [their] carriers" (*id.* at 1a). Florida's tax, in their view, "undermines the basis of reciprocity that has previously existed" between their nations and ours (*id.* at 2a, 9a, 21a, 53a), inviting retaliatory measures by local jurisdictions elsewhere (*id.* at 5a, 9a, 23a, 41a, 48a). The diplomatic notes repeatedly stress the damage that a proliferation of such taxes would cause to international aviation (*id.* at 9a, 10a, 14a, 23a), and, in several instances, take the position that Florida's tax is inconsistent with the bilateral aviation compacts that the United States has executed with their governments (*id.* at 2a, 5a, 13a, 16a, 31a, 37a, 46a, 53a).

B. A State Tax Is Invalid Under The Commerce Clause If It Frustrates Attainment Of Federal Uniformity On An Aspect Of Foreign Commerce As To Which Federal Uniformity Is Essential, And Thus Prevents The Federal Government From Speaking With One Voice When Regulating Commercial Relations With Foreign Countries

1. In *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), this Court outlined the constitutional analysis to be employed under the Commerce Clause where a state seeks to tax the instrumentalities of foreign commerce. Appellants there were six Japanese maritime companies whose cargo shipping containers were subjected to an ad valorem property tax in Cali-

fornia (441 U.S. at 436). The containers, like the ships on which they were carried, were owned by the Japanese companies, were domiciled and registered in Japan, and were used exclusively in international traffic (*id.* at 436-437).

This Court assumed arguendo that the property tax, as applied to the Japanese containers, would pass the nexus, apportionment, and nondiscrimination tests of *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 279 (1977), and hence would be valid under the Commerce Clause "if the containers at issue * * * were instrumentalities of purely interstate commerce" (441 U.S. at 445, 451). However, because the containers were "instrumentalities of foreign commerce," the Court held that it was necessary to answer two further questions in assessing the tax's validity: "first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments" (*id.* at 451 (original quotation marks omitted)). "If a state tax contravenes either of these precepts," the Court held, "it is unconstitutional under the Commerce Clause" (*ibid.*).

The Court concluded that California's tax, as applied, failed both of these tests (441 U.S. at 451, 453). It noted that the containers were taxed on their full value in Japan, so that California's levy necessarily caused international multiple taxation (*id.* at 436, 446-448, 451-452). And it held that California's tax would "frustrate attainment of federal uniformity" in an area—the imposition of charges on cargo containers used exclusively in international traffic—"where federal uniformity is essential" (*id.* at 448, 453).

The Court relied principally on two considerations in determining that the taxation of cargo containers was a

subject "necessitat[ing] a uniform national rule" (441 U.S. at 449). First, the Court noted that California's levy "create[d] an asymmetry in the international tax structure" (*id.* at 450). A state tax on foreign commerce, the Court said, "must be evaluated in the realistic framework of the custom of nations" (*id.* at 454). Under longstanding international practice, "[o]ceangoing vessels" and "[a]ircraft engaged in international traffic" were immune from taxation except by the nation of their registry or domicile (*id.* at 447 n.11). Cargo shipping containers were likewise regarded by the world community as "instruments of international traffic" (*id.* at 445-446 & n.10), and Japan accordingly taxed appellants' containers "consistently with the custom of nations" (*id.* at 447, 454) with the legitimate expectation that they would not be taxed elsewhere.[27]

A corollary of the "novel[ty]" of California's tax, when viewed against the established custom of nations, was the risk that other countries would retaliate against American carriers, a result that would plainly "place * * * impediments before this Nation's conduct of its foreign relations and its foreign trade" (441 U.S. at 450, 453). It was stipulated that "American-owned containers are not taxed in Japan," so that California's tax "create[d] an asymmetry in international maritime taxation operating to Japan's disadvantage." Under these circumstances, "[t]he risk of retaliation by Japan" was, in the Court's words, "acute." *Id.* at 453. Indeed, the Court noted that some nations provide a tax exemption for foreign-owned instrumentalities of commerce "only if the owner's country grants a reciprocal exemption"

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[27] In our brief amicus curiae in *Japan Line* (77-1378 Br. at 14a), we noted the State Department's findings that "no foreign government, or political subdivision such as a province, state or municipality, imposes property taxes on foreign flag vessels, airlines, or containers, with the possible exception of Afghanistan."

(*id.* at 453 n.18). Hence, "[r]etaliation by some nations could be automatic" and "of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer" (*id.* at 450, 453 & n.18).

The second factor which the Court in *Japan Line* held to evidence "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce" was the Customs Convention on Containers, May 18, 1956, 20 U.S.T. 301 *et seq.*, a multilateral compact ratified by the Senate to which both this country and Japan were party (441 U.S. at 452). Under that Convention, containers temporarily imported into this country are admitted free of customs duty and of "all duties and taxes whatsoever chargeable by reason of importation" (*id.* at 453 (citing 20 U.S.T. 304)). The Court did not hold that the Container Convention preempted California's tax under the Supremacy Clause; indeed, the Convention does not address state and local taxes, or any taxes other than those "chargeable by reason of importation." But the fact that Congress "ha[d] not pre-empted the field by affirmative regulation" was not in the Court's view dispositive of the Commerce Clause outcome, since that Clause, " 'without the aid of congressional legislation . . . affords some protection from state legislation inimical to the national commerce' " (*id.* at 454, quoting *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, 769 (1945)). The Container Convention, while not necessarily a source of preemption, was relevant to the Court's Commerce Clause inquiry because it "reflect[ed] a national policy to remove impediments to the use of containers as 'instruments of international traffic' " (441 U.S. at 453, quoting 19 U.S.C. 1322(a)), and hence showed that it would be inimical to the national commerce for California to tax foreign-owned containers as it sought to do.

2. In subsequent decisions, this Court has consistently reaffirmed the principles of *Japan Line,* both its general analytical approach and its particular sensitivity to state actions that may adversely affect this Nation's foreign commerce. See *South-Central Timber Development, Inc.* v. *Wunnicke,* No. 82-1608 (May 22, 1984), slip op. 18; *Container Corporation* v. *Franchise Tax Board,* 463 U.S. 159, 171, 184-197 (1983); *Mobil Oil Corp.* v. *Commissioner of Taxes of Vermont,* 445 U.S. 425, 446-449 (1980). With equal consistency, however, the Court has declined to expand the principles of *Japan Line* to invalidate state taxes imposed on the income of domestically-based multinational corporations. The Court has reached that result whether the income takes the form of foreign-source dividends (*Mobil Oil Corp.,* 445 U.S. at 446-448) or foreign-source operating earnings (*Container Corporation,* 463 U.S. at 169 n.7).

The Court in *Container Corporation* noted "a number of important [similarities]" (463 U.S. at 187) between that case and *Japan Line.* The multinational taxpayer in each case had demonstrated some degree of "actual double taxation" (463 U.S. at 184, 187 & n.22). And California in each case had adopted a taxing policy (in *Container Corporation,* the "unitary method" of apportioning transnational income) that reflected "a serious divergence" from the policy adopted by the federal government (in *Container Corporation,* the "arm's-length method" of allocating intercorporate income), a federal policy which in turn was "consistent with accepted international practice" (463 U.S. at 187). But the Court also noted that there were "a number of ways in which [*Container Corporation* was] clearly distinguishable from *Japan Line*" (463 U.S. at 187), and these distinctions were held to carry the day.

First, the Court noted (463 U.S. at 187-188), as it had in *Mobil Oil Corp.* (445 U.S. at 448), that there are sub-

stantial differences between taxes on the income of a domestic taxpayer and "ad valorem property taxes assessed directly upon instrumentalities of foreign commerce." Taxes on foreign ships and planes, obviously, burden commerce in a more immediate and concrete way than taxes on the international cash flows of a domestic company. The Court emphasized, moreover, the difficulty of trying to figure out where the income of a multinational unitary business is really "earned." *Container Corporation,* 463 U.S. at 164-169, 192. Accord, *e.g., Exxon Corp.* v. *Wisconsin Dep't of Revenue,* 447 U.S. 207, 222 (1980); *Mobil Oil Corp.,* 445 U.S. at 438-439. Such difficulties, of course, do not attend efforts to ascertain the registry of an airplane or the home port of a ship.

A corollary of this difference between taxes on instrumentalities and taxes on income was a marked difference in "the alternatives reasonably available to the taxing State" (463 U.S. at 189, 192). In *Japan Line,* the state could avoid any burden on foreign commerce "simply by adhering to one bright-line rule: do not tax, to any extent whatsoever, cargo containers 'that are owned, based, and registered abroad and that are used exclusively in international commerce' " (463 U.S. at 189-190 (quoting 441 U.S. at 444)). To require that the State in *Japan Line* adhere to this rule "was by no means unfair, because the rule did no more than reflect consistent international practice and express federal policy" (463 U.S. at 190). In *Container Corporation,* by contrast, the state could not reasonably be expected utterly to refrain from taxing the domestic company's income, some of which was plainly earned within the state; and the question thus boiled down to a choice between competing allocation methods, each of which was concededly imperfect (463 U.S. at 182-184), and each of which could end up burdening foreign commerce depending on the particular facts involved (*id.* at 188 &

n.25, 190-193). In short, the Court did not believe that there existed in *Container Corporation,* as there existed in *Japan Line,* any method, at once obvious and fair, by which the state could ensure that foreign commerce would be perfectly protected.

Secondly, the Court in *Container Corporation* emphasized that the tax there "f[ell], not on the foreign owners of an instrumentality of foreign commerce, but on a corporation domiciled and headquartered in the United States" (463 U.S. at 188). "The most obvious foreign policy implication of a state tax," the Court noted, "is the threat it might pose of offending our foreign trading partners and leading them to retaliate against the Nation as a whole" (*id.* at 194 (citing *Japan Line,* 441 U.S. at 450)). Given the American residency of the taxpayer in *Container Corporation,* the risk of retaliation in that case, relatively speaking, was slight, for foreign governments generally have little interest "in reducing the tax burden of domestic corporations" (463 U.S. at 195). The Court observed that it had "specifically left open in *Japan Line* the application of that case to 'domestically owned instrumentalities engaged in foreign commerce' " (463 U.S. at 188-189 (quoting 441 U.S. at 444 n.7)), and, contrariwise, it specifically left open in *Container Corporation* the application of that case to the income of foreign or foreign-owned corporations (463 U.S. at 189 n.26).[28]

Besides the taxpayer's American domicile, the Court in *Container Corporation* cited other factors suggesting that the foreign relations impact there, as compared with *Japan Line,* would likely be marginal. Whereas in *Japan Line* "a convention signed by the United States

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[28] Since the instant appeals present challenges to a state excise tax on aviation fuel, the Court in these cases would likewise have no occasion to address the validity of state income taxes imposed on foreign or foreign-owned corporations.

and Japan made clear * * * that neither National Government could impose a tax on temporarily imported cargo containers whose home port was in the other nation" (463 U.S. at 185), no comparable multilateral treaty existed in the income tax field. Although the United States had signed bilateral income tax agreements with many foreign nations, none addressed "the taxing activities of subnational governmental units such as States" (463 U.S. at 196 (footnote omitted)). Whereas the tax in *Japan Line* had created an asymmetry in international maritime taxation that *automatically* operated to foreign countries' disadvantage (463 U.S. at 194-195 (citing *Japan Line,* 441 U.S. at 453)), the Court did not believe that the same was true in *Container Corporation,* since California's "unorthodox treatment" could on the Court's view help or hurt a given taxpayer depending on the particular facts involved (463 U.S. at 195). Finally, the Court "note[d] * * * that in [*Container Corporation*], unlike *Japan Line,* the Executive Branch ha[d] decided not to file an *amicus curiae* brief in opposition to the state tax" (463 U.S. at 195 (footnote omitted)). For all these reasons, the Court concluded that California's unitary method of taxing domestic companies' income, unlike California's tax on the instrumentalities of foreign commerce in *Japan Line,* neither "implicate[d] foreign policy issues which must be left to the Federal Government" nor "violate[d] a clear federal directive," and hence did not prevent this Nation from speaking with one voice in foreign affairs (463 U.S. at 194).

C. Florida's Tax On Aviation Fuel Used By Foreign Airlines Exclusively In Foreign Commerce Is Inconsistent With Express Federal Policy And Established International Practice And Hence Should Be Invalidated Under The Commerce Clause

These cases present a substantial federal question concerning the power of a state to levy an excise tax on the instrumentalities of foreign commerce. This question is not directly controlled by any of this Court's prior decisions. However, we think that the situation here comes very close indeed to that presented in *Japan Line,* and we believe that Florida's tax should be declared unconstitutional as applied.

1. We agree with the courts below (see 84-902 J.S. App. A6, A33) that the "multiple taxation" aspect of *Japan Line* is not a concern in the instant cases. Appellants have not proved—indeed, they have not argued—that Florida's sales tax on aviation fuel "produces multiple taxation in fact" (*Japan Line,* 441 U.S. at 452). Nor do we think that Florida's tax "creates a substantial risk of international multiple taxation" (*id.* at 451). As this Court has noted in sustaining analogous state taxes on aviation fuel used by domestic carriers on interstate flights, the "taxable event" is the carrier's purchase of the fuel or its "withdrawal [of the fuel] from storage." *United Air Lines, Inc.* v. *Mahin,* 410 U.S. 623, 627 (1973). Accord, *Edelman* v. *Boeing Air Transport, Inc.,* 289 U.S. 249, 251-252 (1933); *Eastern Air Transport, Inc.* v. *South Carolina Tax Comm'n,* 285 U.S. 147, 152-153 (1932).[29] These taxable events, ob-

[29] These cases clearly do not control the outcome here. In each case, the airline was a domestic rather than a foreign corporation, and it appears that solely interstate, rather than international, flights were involved. See *United Air Lines, Inc.,* 410 U.S. at 624, 625, 629; *Edelman,* 289 U.S. at 250-251; *Eastern Air Transport,*

viously, take place entirely within the taxing state, and no foreign government, consistently with the custom of nations, could undertake to impose a levy upon them. In fact, far from being able to tax the event of sale, foreign nations could not purport to tax even the fuel itself, which typically will be consumed in international air space en route from the United States.

2. We agree with appellants, however, that Florida's tax is invalid under the "federal uniformity" aspect of *Japan Line,* which, as the Court there emphasized (441 U.S. at 451), is a separate and independent basis for invalidating a state tax under the Foreign Commerce Clause. In our view, the salient features of these cases put them virtually on a par with *Japan Line* and distinguish them in equal measure from *Container Corporation.* Those features, which we have already discussed in one way or another, may be briefly recapitulated:

First, the airlines here, like the shipping companies in *Japan Line,* are foreign rather than domestic corporations. Indeed, besides being domiciled abroad, many of the airlines are wholly or substantially owned by their national governments. See page 3, *supra.*

Second, the state tax here is imposed, as in *Japan Line,* not on income, but directly on the instrumentalities of foreign commerce. In *Japan Line,* the Court noted that the cargo containers sought to be taxed were associated with the ships that carried them both in our bilateral and in our multilateral agreements (441 U.S. at 436 n.1, 446 n.10, 452-453). Here, similarly, aviation fuel taken on board for use in international traffic is associated with the aircraft that carries it both in the

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Inc., 285 U.S. at 150-151. In any event, the cases were decided long before this Court in *Japan Line* set forth the constitutional analysis to be employed when a state seeks to tax the instrumentalities of foreign commerce.

Chicago Convention and the ICAO Resolutions (see pages 10-13, *supra*) and in our bilateral aviation compacts (see pages 13-17, *supra*). These agreements evidence an international understanding that aviation fuel, no less than the shipping containers at issue in *Japan Line,* is an "instrument[ ] of international traffic" (441 U.S. at 446 n.10, 453).

Third, the state tax here, like the tax in *Japan Line,* "creates an asymmetry in the international tax structure" (441 U.S. at 450) which, unlike the tax in *Container Corporation,* operates *automatically* to foreign nations' disadvantage (see 463 U.S. at 194-195). The uniform practice of nations, evidenced by the Chicago Convention, the ICAO Resolutions, and other countries' implementation of those Resolutions, calls for the instrumentalities of international air traffic to be exempt from all taxes and duties (other than user fees) imposed *either* by national governments *or* by their political subdivisions. Indeed, this policy of reciprocal tax exemptions for the instrumentalities of airborne and maritime trade is the very same "custom of nations" upon which the Court in *Japan Line* relied (441 U.S. at 447 & n.11, 453 & n.18) in invalidating the tax there involved.

Fourth, there exists here, as in *Japan Line,* an "express federal policy" (*Container Corporation,* 463 U.S. at 190), evidenced by multilateral agreements, bilateral agreements, the federal statutory scheme, and consistent regulatory practice, favoring reciprocal tax exemptions for aviation fuel and supplies used in foreign commerce. Our bilateral aviation compacts do not expressly preempt, any more than the Container Convention in *Japan Line* expressly preempted, state taxes on aviation fuel. However, those agreements do "reflect[ ] a national policy to remove impediments to the use of [aircraft] as instruments of international traffic." *Japan Line,* 441 U.S. at 453 (original quotation marks omitted).

Fifth, it is possible here, as it was possible in *Japan Line,* for the state to avoid any burden whatsoever on foreign commerce by adhering to "a single internationally accepted bright-line standard" (*Container Corporation,* 463 U.S. at 193), namely, "do not tax, to any extent whatsoever, [fuel and supplies used by aircraft] 'that are owned, based, and registered abroad and that are used exclusively in international commerce.' " *Id.* at 189-190 (quoting *Japan Line,* 441 U.S. at 444). Here, as in *Japan Line,* "[t]o require that the State adhere to this rule [is] by no means unfair, because the rule [does] no more than reflect consistent international practice and express federal policy" (*Container Corporation,* 463 U.S. at 190). The difficulties that might attend state efforts absolutely to avoid burdening foreign commerce where income taxes are concerned simply do not arise in these cases.

Finally, the tax involved here, like the tax involved in *Japan Line,* clearly "implicate[s] foreign affairs" (*Container Corporation,* 463 U.S. at 194). The State Department has received diplomatic notes from 25 foreign nations protesting Florida's tax in the strongest terms. These notes reflect concern, not only about the instant tax, but about the possibility that "other States [will] follow[ ] the taxing State's example" (*Japan Line,* 441 U.S. at 450-451). See App., *infra,* 3a, 6a, 21a, 42a, 52a. Foreign nations' concerns in this respect have proven justified, since Florida's example has already been followed by Illinois[30] and Massachusetts,[31] and a bill

[30] See Ill. Admin. Reg. § 130.2080(c) (1984) (repealing exemption from sales tax on purchases of aviation fuel previously granted to companies whose stock was "owned exclusively or in part by foreign governments"). A lawsuit challenging this action was recently filed in Illinois trial court by ten foreign airlines. *Air Canada, et al.* v. *Department of Revenue of the State of Illinois,* No. 85CH-6973 (Cook County Cir. Ct. July 12, 1985).

[31] See Mass. Act of July 1, 1985, ch. 145, §§ 7, 9 (enacting new 5¢-per-gallon excise tax on aviation fuel and affording no exemp-

that would accomplish the same result has been introduced in California.[32] The diplomatic notes stress that a proliferation of aviation fuel taxes would prevent this country from offering "true reciprocity" to our trading partners (App., *infra*, 23a), provoking the threat of foreign retaliation that would jeopardize the reciprocal exemption policy.[33]

3. For these reasons, we believe that the Court should note probable jurisdiction in the instant three appeals. The cases involve airlines from 14 different countries, whose bilateral agreements with the United States differ in subtle ways. Although the outcome in our view should generally be dictated by overriding federal policy and established international practice rather than by the idiosyncratic provisions of particular compacts, we think the Court would benefit from having all the relevant fact patterns before it. Particularly might this be true in the case of the Canadian airline, appellant in

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tion for fuel purchased by foreign airlines for use in foreign commerce). The Massachusetts law provides that the new tax shall not be construed "to apply to foreign or interstate commerce, except insofar as the same may be permitted under the provisions of the constitution and laws of the United States." *Id.* § 7 (to be codified at Mass. Gen. Laws Ann. ch. 64J, § 10).

[32] Assembly Bill 2341, Cal. Leg., 1985-1986 Reg. Sess. § 5 (as amended May 24, 1985) (repealing fuel tax exemption previously granted to airlines holding common carrier certificates under the laws of the United States "or of any foreign government").

[33] Besides the possibility of imposing taxes, foreign governments have at their disposal numerous other techniques for discriminating against United States airlines. They can levy artificially-inflated "user fees"; impose obstacles to repatriation of foreign earnings; route airlines to less desirable airports; refuse to let carriers use baggage handlers of choice; give local airlines preference in carrying air cargo; restrict United States airlines' local advertising; or impose excessively complicated customs procedures or other delays and inconveniences. See U.S. Civil Aeronautics Board, *FY 1976 Report to Congress* 103-108 (1977).

No. 84-902, which, owing to Canada's failure to accord American carriers reciprocal exemptions from provincial taxes on aviation fuel (see page 13, *supra*), could conceivably be situated differently from the other appellants.

CONCLUSION

Probable jurisdiction should be noted in No. 84-902; in No. 84-922, limited to the first question presented therein; and in No. 84-1041, limited to the first two questions presented therein.[34] For the reasons stated in our companion brief in Nos. 84-921, 84-926 and 84-929, the other questions presented here are insubstantial.

Respectfully submitted.

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Acting Solicitor General
ALBERT G. LAUBER, JR.
Assistant to the Solicitor General

ABRAHAM D. SOFAER
Legal Adviser
Department of State
JIM J. MARQUEZ
General Counsel
Department of Transportation

SEPTEMBER 1985

[34] The Court may wish to consolidate the cases for oral argument.

APPENDIX

EMBASSY
OF THE
ARGENTINE REPUBLIC

D.E. No. 910

The Embassy of the Argentine Republic presents its compliments to the Department of State and has the honor to refer to the lawsuit *Lineas Aereas Costarricenses, S.A. v. State of Florida*, which it understands is currently pending before the Supreme Court of the United States. The Embassy of the Argentine Republic wishes to request that the United States support the position taken by the Argentine carrier and many other South American airlines in that case by making a formal presentation before the Court.

It is the policy of Argentina to exempt United States airlines from taxes on aviation fuel purchased by them in Argentine territory. As a result, United States airlines pay no fuel taxes to any governmental authority at any level in Argentina. This policy is based on the assumption that the United States will provide reciprocal treatment to Argentine carriers. Recent events in the State of Florida have called that assumption into question.

The Embassy understands that the State of Florida has imposed a 5.7¢ per gallon tax on aviation fuel purchased in that jurisdiction. We also understand that this tax applies to all fuel purchased by international airlines whether or not it is consumed within United States territory. The Embassy of the Argentine Republic is concerned that this tax, if allowed to stand, will place the United States in conflict with provisions of a number of international

agreements and the established international practice of providing exemptions from fuel taxes. They may, in turn, undermine the basis of reciprocity that has previously existed between the United States and Argentina.

The Embassy of the Argentine Republic would call the attention of the Department of State to Article 24 of the Chicago Convention and, in particular, to resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966. These documents make clear the established international practice that airlines should not be required to pay taxes on items such as fuel. They also make it clear that this policy extends not only to taxes imposed by the Central Government, but also those established by local jurisdictions.

The current Air Tansport Services Agreement between the United States and Argentina applies this principle in the United States-Argentina markets. Article F of that agreement requires both parties to provide for exemption from taxes. The Embassy of the Argentine Republic notes that this provision is not limited to taxes imposed at any particular level of government and is clearly intended to cover all taxes and similar governmental charges. On the basis of this provision, Argentina has provided tax exemptions to United States airlines. The Embassy of the Argentine Republic respectfully submits that consistent with this agreement, the Government of the United States should do the same. This would require exemption of Argentine carriers from the Florida tax.

The Embassy of the Argentine Republic also notes that there are strong policy reasons supporting the rule against taxation of airline fuel. Many airlines

presently face serious economic challenges and cannot afford the additional burden that fuel taxes would impose on them. These airlines would be compelled to pass this tax onto their passengers and shippers. This would adversely affect the development of international aviation. Additionally, the Embassy of the Argentine Republic would note that if the Florida tax is found acceptable under United States law, other jurisdictions in the United States are likely to impose similar taxes. Indeed, the Embassy of the Argentine Republic understands that the State of Illinois has already taken such action in reliance upon the recent decision of the Florida Supreme Court upholding this tax. The Embassy of the Aregntine Republic is concerned that the establishment of such taxes would not only increase the expenses that airlines and their customers must bear, but would also pose difficult administrative problems. The Embassy of the Argentine Republic believes this would be inconsistent with the many international agreements calling for the establishment of uniform practices affecting international aviation. In view of all of these factors, if the Florida tax is permitted to be imposed, the Embassy of the Argentine Republic believes that foreign countries would feel compelled to re-examine critically whether the United States is, in fact, providing a satisfactory degree of reciprocity regarding fuel taxes.

The Embassy of the Argentine Republic understands that the validity of this tax is now under review in the Supreme Court of the United States in the *Lineas Aereas Costarricenses, S.A.* lawsuit previously mentioned. The Embassy of the Argentine Republic respectfully requests the United States to support the position of the foreign airlines challenging

this tax through the submission of an *amicus curiae* brief to the United States Supreme Court and to bring to the attention of that Court the implications that this tax has for the established system of international aviation.

The Embassy of the Argentine Republic wishes to advise the Department of State that this note should not be considered confidential and that it may be released to the public.

The Embassy of the Argentine Republic avails itself of this opportunity to express renewed assurances of its highest consideration.

Washington, D.C., December 27, 1984

AMBASSADE DE BELGIQUE

The Belgian Embassy presents its compliments to the State Department and wishes to draw its kind attention to the subject of fuel taxes imposed by States of the United States on international aviation.

Belgium exempts at all levels of its government fuel used in international airline operations by United States carriers. This exemption is based on reciprocity.

Belgium emphasizes the established international consensus favoring reciprocal exemption from taxes on the basis of Article 24 of the Chicago Convention as well as the resolutions of the ICAO Council of November 14, 1966 (ICAO Document 8632-C/968).

It is well known that many airlines are facing at the present time serious economic challenges and can ill afford the extra financial burden these taxes impose. Under these circumstances, similar taxes could be imposed by other governments including the government of Belgium.

Finally, State fuel taxes are incompatible with Article 9 of the bilateral aviation agreement between the United States and Belgium which specifically commits the United States Federal Government to use its "best efforts" to obtain exemption of taxes at all levels including the state and local level.

The Embassy of Belgium welcomes the opportunity to renew to the Department of State the assurances of its highest consideration.

Washington D.C., November 30, 1984.

[EMBASSY OF THE FEDERATIVE REPUBLIC OF BRAZIL]

No. 9

The Embassy of the Federative Republic of Brazil presents its compliments to the Department of State and has the honor to refer to the imposition of fuel taxes on foreign airlines by the State of Florida.

Such legislation, effective April 1, 1983, imposes a 5.7 cents per gallon tax on all aviation fuel purchased in the State of Florida, regardless of whether it is to be consumed in Florida or outside the United States.

This matter is of the greatest concern to the Brazilian Government for the following reasons:

A) a state fuel tax on international airlines appears to be incompatible with the spirit of paragraph VII of the Memorandum of Consultation of June 14, 1984, regulating bilateral civil aviation relations. In it each party agreed to the commitment "to make all possible efforts to ensure that the airlines of each country can operate at the maximum efficiency with a fair and equal opportunity".

B) the imposition of such state fuel tax may be deemed to be contrary to Article 24 of the Convention on International Civil Aviation (Chicago Convention), which provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Further resolutions by the ICAO Council also provide for exemption from customs and all duties from fuel taken by foreign airlines.

C) other states in this country appear to be encouraged by the Florida fuel tax and seem to be inclined to impose similar taxes of their own.

D) like many other airlines, Brazilian airlines serving the US-Brazil market are currently facing serious economic challenges for which the Florida fuel tax would represent an additional financial burden.

The Brazilian Embassy is informed that a number of foreign airlines, [including] the Brazilian carrier VARIG S.A., will soon appeal to the United States Supreme Court the decision of the Florida Supreme Court of June 14, 1984, which reversed a lower State Court judgment exempting foreign airlines [from] the aforementioned tax. The Brazilian Embassy would appreciate it if the United States Government would extend formal support to the position of the plaintiffs through an *amicus curiae* brief to the Supreme Court, or any other means deemed appropriate.

The Embassy of the Federative Republic of Brazil avails itself of this opportunity to renew to Department of State the assurances of its highest consideration.

Washington, D.C., January 8, 1985.

EMBAJADA DE COLOMBIA
WASHINGTON

No. 1679/E-375

The Embassy of Colombia presents its compliments to the Department of State and has the honor to refer to the legal action instituted by a group of South American airlines entitled *Lineas Aereas Costarricenses, S.A., et al. v. State of Florida Department of Revenue.* The Colombian airline AVIANCA is one of the plaintiffs in this suit, which is now before the Supreme Court of the United States. This lawsuit challenges the validity of a law of the State of Florida imposing a tax of nearly six cents per gallon upon fuel taken aboard by the foreign airlines at Florida airports for international use.

The Embassy of Colombia wishes to bring to the attention of the Department of State its conviction that it is totally inappropriate for local jurisdictions to impose taxes upon fuel intended for use by international airlines. For many years there has been an established practice among nations of exempting fuel purchased by international airlines from tax. This practice is demonstrated in Article 24 of the Convention on International Civil Aviation and resolutions on this subject adopted by the Council of the International Civil Aviation Organization on November 14, 1966. This policy has played an important role in the healthy growth of international aviation by preventing an inappropriate financial burden on airlines and their customers.

Consistent with this international practice, Colombia does not impose taxes at the national or local level upon fuel intended for international airline use. Therefore, all American airlines in Colombia are

fully exempt from fuel taxes at all levels of government. This exemption is based upon effective reciprocity from the United States, including taxing authorities in state and local governments. The Embassy of Colombia views the imposition by the State of Florida of a tax upon fuel intended for use by Colombian carriers as an infringement upon the reciprocity that had previously been established.

The Embassy of Colombia also wishes to point out that the example of Florida could set a precedent to be followed by other governments. If the United States allows its states to impose taxes upon fuel purchased by international airlines, the airlines of the United States could very soon see the initiation of local or national taxes by other nations. The development of such a pattern would surely be detrimental to the interests of all concerned and harmful to the development of aviation.

The Embassy of Colombia understands that the LACSA lawsuit is now pending before the Supreme Court of the United States and strongly urges the United States to formally support the position of the international airlines by submitting to the Supreme Court a brief as *amicus curiae*. The active involvement of the United States in the Supreme Court proceedings would be viewed by Colombia as an appropriate action by the United States in fulfillment of its commitment to provide reciprocal tax exemption in matters regarding international aviation.

The Embassy of Colombia informs the Department of State that the contents of this note are not classified and can be disclosed.

The Embassy of Colombia avails itself of this opportunity to renew to the Department of State the assurance of its highest consideration.

EMBAJADA DE COSTA RICA
WASHINGTON, D.C. 20008

No. 893

October 24, 1984

Dear Mr. Secretary:

I have the honor to address your Excellency with respect to the matter of the imposition of fuel taxes by the State of Florida on international aviation, as well as similar taxes imposed by other local jurisdictions in the United States.

As your Excellency may know, reciprocal tax exemption treatment has been the practice worldwide to aircraft serving international routes. There is an international consensus expressed in Article 24 of the Chicago Convention as well as in ICAO resolution Document 8632-C/968.

Furthermore, the unilateral imposition of fuel taxes on international aviation on the part of the State of Florida is contrary to and violates the spirit of bilateral aviation agreements which provide for exemptions on the basis of reciprocity from national duties and charges.

In addition, the imposition of such aviation fuel taxes, on the part of state tax authorities, is undesirable as a matter of policy. It is not only detrimental to the overall development of international aviation, but could result in a confusing administrative situation and the possibility of widespread aviation fuel taxes worldwide.

Excellency, as a group of international airlines are presenting this matter to the United States Supreme Court in the very near future, on behalf of my Government I would kindly request your good offices to

obtain the support of the Government of the United States before said Court in favor of the principle of the reciprocal fuel tax exemption treatment which is embodied in the letter and the spirit of international aviation relations.

Accept, Excellency, the assurances of my highest consideration.

/s/ Claudio A. Volio
CLAUDIO A. VOLIO
Ambassador

EMBAJADA DEL ECUADOR
WASHINGTON, D.C.

No. -4-2- 185/84

The Embassy of Ecuador presents its compliments to the Department of State and has the honor to request the Department's attention to the following matter.

The State of Florida has imposed a tax of 5.7 cents per gallon on all aviation fuel sold in the State. This tax, which became effective April 1, 1983, is applicable even if the fuel is consumed outside the state or even outside the United States. The tax is thus imposed on fuel purchased by Empresa Ecuatoriana de Aviación ("Ecuatoriana"), the flag carrier of Ecuador, and other Ecuadorean cargo airlines that operate in the State of Florida.

Numerous South American air carriers, including Ecuatoriana, have filed a lawsuit in the Florida state courts (*Líneas Aéreas Costarricenses, S.A. et al. v. State of Florida Department of Revenue*) to challenge this law as being in violation of the United States Constitution. In 1983 the trial court held that foreign air carriers must be exempted from the tax. This decision was reversed by the Florida Supreme Court in June 1984. The carriers have appealed the case to the United States Supreme Court.

The Embassy of Ecuador wishes to inform the Department of State of the grave concern of the Government of Ecuador concerning the imposition of this tax on international air carriers such as Ecuatoriana. It is inappropriate for local jurisdictions such as the State of Florida to impose taxes on fuel used by international air carriers. Under the established practice of nations such fuel purchases are exempt from

tax. Consistent with this practice Ecuador does not impose taxes at the national or local level on fuel used by international air carriers. The Florida tax is inconsistent with this international standard of reciprocity.

This established practice of nations is also demonstrated by Article 24 of the Convention on International Civil Aviation ("Chicago Convention") and resolutions adopted by the Council of the International Civil Aviation Organization on November 14, 1966 (ICAO Document 8632-C/968). The Council resolved that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties." The term "customs and duties" includes "import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State." (Sec. 1, paras. 1 and 4).

The Embassy of Ecuador further regards the Florida tax on fuel to be used by Ecuatoriana as being inconsistent with the Air Transport Services Agreement between the Governments of the United States and Ecuador (TIAS 1606), which provides for exemption of fuel from "customs, inspection fees or similar duties or charges." (Art. 3 (c)). Consistent with the Agreement, as indicated above, Ecuador does not impose taxes at the national or local level on fuel used by international air carriers.

The imposition of Florida's tax could set a precedent for similar action by other governments. If that were to happen international air carriers—including those of the United States—would be substantially burdened by taxes imposed by national or local [authorities] of other nations. This would be detrimental to the maintenance and development of international aviation.

The Embassy of Ecuador understands that participation by the United States Government in the litigation before the Supreme Court in support of the position of the international air carriers would be important in protecting their interests. It further understands that the United States has presented *amicus curiae* briefs in similar circumstances. Therefore, the Embassy of Ecuador urges that the Government of the United States file an *amicus curiae* brief with the Supreme Court supporting the position of the international air carriers.

The Embassy of Ecuador avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., December 14, 1984

[EMBASSY OF EL SALVADOR]

1. Following is an informal translation of the text of Diplomatic Note 14139 dated December 3, 1984 from the government of El Salvador. Original is being pouched to department

2. I have the honor of addressing your Excellency with regard to air transport relations between the government of the United States of America and the government of El Salvador.

In particular allow me to call to the attention of Your Excellency a tax ruling regarding a tax on aviation fuel, established by the State of Florida and entered into force the first of April 1983, applying to airlines which do not have their principal offices in Florida, as is the case of the Salvadoran Air Line, Taca International Airlines, S.A.

Allow me to make known to Your Excellency, so that you can bring to the attention of the competent authorities of your government, that said ruling is not in accord with Article 9(2)(C) of the Air Transportation Agreement between the government of El Salvador and the government of the United States of America by virtue of which, on a reciprocal basis, are exempted from taxes "fuel, lubricants and the consumable technical supplies introduced into or supplied in the territory of a party for use in an aircraft of a designated airline of the other party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the party in which they are taken on board." In this case, the principle established in this article, based on reciprocity, is not be-

ing applied by Your Excellency's government, while the North American Airlines enjoy this exemption.

On the other hand, based on Articles 9(5) and 11 (1, 2) of the Referenced Agreement, each party shall try to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes imposed by state, regional and local authorities, with the objective of allowing a fair and equal opportunity for said airlines, using all appropriate methods within its jurisdiction to eliminate all forms of discrimination which adversely affect the competitive position of the airlines of the other party.

As a consequence of the fact that the action taken by the State of Florida contravenes Article 9(2)(C) and based on Article 9(5) and Article 11 (1, 2) the government of El Salvador urges your illustrious government to take the necessary actions to avoid application to the airline designated by El Salvador of this measure imposed contrary to the principles established in the air transportation agreement.

I take this opportunity to renew to Your Excellency the assurances of my highest and most distinguished consideration.

AMBASSADE DE FRANCE
AUX ETATS-UNIS

Washington, D.C.

30 novembre 1984

L'Ambassade de France présente ses compliments au Département d'Etat et a l'honneur de lui faire savoir ce qui suit:

La taxation sur les carburants des aeronefs instaurée par l'Etat de Florida à la suite d'une décision, en date du 11 avril 1983, préoccupe vivement les Autorités francaises.

1. En effet, cette mesure, susceptible à l'évidence d'être prise et appliquée dans d'autres Etats en termes voisins ou comparables, nous paraît, pour l'essentiel, en opposition avec l'esprit de notre accord bilatéral de services aériens du 27 mars 1946, notamment avec son article 3-C.

De même est-elle en opposition avec l'article 24 (A) de la Convention de Chicago en date du 7 décembre 1944.

Les autorités francaises croient donc devoir relever que le maintien d'une telle mesure risquerait de porter atteinte, du point de vue des responsabilités internationales, à la notion même d'accords bilatéraux de services aériens qui pourraient ainsi être modifiés de manière unilatérale et contrairement aux engagements formels souscrits par le gouvernement des Etats-Unis.

Cette constatation avait dèjà été faite par la note adressée le 5 mars 1984 par l'Ambassade à propos de l'affaire—analogue dans son esprit—de la suppression, dans l'Etat d'Illinois, de l'exonération de la taxe sur les achats effectués dans les aéroports.

2. En outre, cette mesure est contraire à la résolution ad hoc du Conseil de l'Organisation de l'Aviation Civile Internationale du 14 novembre 1966 qui prévoit à la section 1, paragraphes 2 et 4, que:

"lorsqu'un aéronef immatriculé dans un Etat part d'un aéroport international d'un autre Etat, soit à destination d'un autre territoire douanier de celui-ci, soit à destination du territoire d'un autre Etat, le carburant, les lubrifiants et autres produits consommables embarqués pour être consummés en vol doivent être fournis en franchise de tous droits de douane et autres, ou que les droits percus doivent être remboursés, à condition qu'avant de quitter le territoire douanier considéré, l'aéronef ait rempli toutes les formalités douanières et autres formalités de congé prescrites sur ce territoire."

Or, cette résolution, fondée sur la notion de réciprocité, est admise par tous les pays. Sa remise en cause porterait atteinte au climat des échanges internationaux; et elle constituerait une entrave certaine au développement des transports aériens internationaux, leur infligeant des surcoûts d'exploitation qui devraient alors être inévitablement supportés par les passagers.

S'agissant de la France, sa pratique est conforme à la résolution de l'OACI précitée, puisque les aéronefs immatriculés aux Etats-Unis, qui partent d'un aéroport francais à destination de n'importe quel autre Etat, sont exonérés, à raison du carburant et de produits embarqués, de la taxe sur la valeur ajoutée (TVA) par l'article 262-11-6 du code général des impôts, ainsi que de la taxe intérieure sur les produits pétroliers (TIPP) par l'article 192, section VI, du code des douanes.

Dans ces conditions, l'Ambassade de France, d'ordre de son Gouvernement, tient à appeler l'attention des Autorités américaines sur l'importance attachée à une solution rapide et heureuse de ce contentieux. Pour leur part, les Autorités francaises sont convaincues de la nécessité, pour les Autorités américaines, d'appuyer auprès de la Cour Suprême des Etats-Unis, la procédure engagée par un groupe de compagnies aériennes pour obtenir l'annulation de la mesure prise par l'Etat de Floride. Elles leur seraient donc reconnaissantes d'engager toute action adéquate dans ce sens.

Les Autorités francaises n'ont pas d'objections à ce que le contenu de cette note soit rendu public.

L'Ambassade de France saisit cette occasion pour renouveler au Département d'Etat l'assurance de sa très haute considération.

EMBASSY OF THE
FEDERAL REPUBLIC OF GERMANY
WASHINGTON, D.C.

The Embassy of the Federal Republic of Germany presents its compliments to the Department of State and has the honor to refer to the following:

By law effective April 1983, the State of Florida imposed a tax of 5.7 cents per gallon on all aviation fuel sold in Florida, regardless where the fuel is consumed. A group of airlines challenged the legality of the tax in the courts. On June 1, 1983, the Second Circuit Court in and for Leon County, Florida, decided that foreign carriers serving Florida must be exempted from the tax. On appeal by the State of Florida, however, the Florida Supreme Court, on June 14, 1984, reversed the lower court's judgment and held that the imposition of the tax on foreign airlines is legal. The airlines have appealed this decision to the United States Supreme Court.

For the reasons set forth below, the Embassy of the Federal Republic of Germany would appreciate it if the Department of State would support the position of the airlines by an amicus curiae brief to the United States Supreme Court:

1. Article 24 of the Convention on International Civil Aviation provides that fuel on board an aircraft of a Contracting State shall be exempt from customs duty, inspection fees or similar national or local duties and charges. Furthermore, a resolution adopted by the ICAO council on November 14, 1966 (ICAO-Doc. 8362-C/968-1966) provides exemption from customs and all other duties for foreign aircraft taking on board fuel and other consumable supplies.

2. During the still pending negotiations on a new bilateral air transport agreement both delegations achieved consensus on a new article 9, which, in extension of Article 7 of the bilateral air transport agreement of 1955, would grant reciprocal exemptions from national taxes for all purchases of aviation fuel. Both Contracting Parties would use their best effort to secure exemption of the said taxes imposed by state, regional or local authorities.

3. In the Federal Republic of Germany, foreign airlines are exempt from taxes on the purchase of fuel. Should the tax imposed by the State of Florida be upheld, the reciprocity in relation to the exemption existing in the Federal Republic of Germany would be jeopardized.

4. The State of Illinois, apparently encouraged by the judgment of the Florida Supreme Court, already imposed a similar "Retailers' Occupation Tax". Should the judgment of the Florida Supreme Court be confirmed, numerous States of the Union might follow suit. This would disrupt a longstanding worldwide practice established to prevent discrimination and to facilitate the operation of international air services.

5. State taxes on international aviation would prevent the United States to speak with one voice in an important are of foreign trade. This would impede international trade and may be contradictory to the Import-Export Clause of the Constitution of the United States.

The Embassy of the Federal Republic of Germany avails itself of this opportunity to renew to the De-

partment of State the assurance of its highest consideration.

Washington, 29 November 1984

EMBAJADA DE LA REPUBLICA DE
HONDURAS
WASHINGTON, D.C. 20008

November 7, 1984

No. 118-84 EHW/DE

Excellency:

I have the honor to address Your Excellency with respect to the matter of the aviation fuel taxes that have been imposed on international airlines by the State of Florida.

As Your Excellency may know, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention, as well as in ICAO resolution document 8632-C/968.

The Honduran Civil Aeronautic Code contemplates that foreign airlines may introduce, for their own use, duty free fuel and lubricants providing that the Honduran airlines are treated in a reciprocal manner abroad. Since the Republic of Honduras does not have a federal structure, a true reciprocity on the part of the United States would require exemption from taxes at both federal and state levels.

The imposition of fuel taxes by the State of Florida, as well as similar taxes imposed by other local jurisdictions in the United States, could produce retaliatory measures by other foreign governments. This action would be detrimental to the overall development of international aviation and at the same time create administrative, legal, and economic problems.

At the present time, many airlines are facing financial difficulties and these fuel taxes represent a

serious economic challenge for them, which could provide an extra burden on passengers and shippers who use their services.

Excellency, as it is understood that this case will soon be presented to the United States Supreme Court by a group of international airlines, on behalf of my Government I kindly request your cooperation in obtaining the support of the United States Government before the Supreme Court in favor of the principle of reciprocal fuel tax exemption treatment.

Accept, Excellency, the assurances of my highest consideration.

/s/ Juan Agurcia
JUAN AGURCIA
Ambassador

EMBASSY OF ICELAND
2022 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20008

The Embassy of Iceland presents its compliments to the Department of State and has the honor to request assistance in the following matter.

On several occasions the Embassy of Iceland has had the opportunity to express to you Iceland's concern over the continuing failure of the Illinois Department of Revenue to grant to Icelandair (the designated flag carrier of Iceland, partially owned by the government of Iceland) an exemption from Illinois sales and use taxes. Illinois legislation exempts sales to governmental bodies, and the Department of Revenue Rule 40 had confirmed that exemption. Recently, the Illinois Department of Revenue proposed to eliminate such exemption with respect to those foreign air carriers enjoying its benefit, and Iceland again objected. The Illinois Department of Revenue has now in fact eliminated the Rule 40 exemption and is now assessing its sales and use tax against foreign air carriers, regardless of the level of governmental ownership. The City of Chicago continues to levy its local taxes as well. As we have expressed to you, this local taxation is contrary to the tax treaties between the United States of America and Iceland, and is not in the best interest of foreign commerce between our nations.

We have learned that a recent State of Florida Supreme Court decision upheld that state's fuel tax on international aviation. We understand that the carriers involved have appealed to the United States Supreme Court in the case entitled "*Lineas Aereas Costarricenses, S.A. (LACSA), et al. v. Department*

of Revenue, State of Florida". Although the Republic of Iceland is not directly involved as a litigant, we have noted with great interest that the Illinois Department of Revenue, in support of its successful proposal to eliminate the Rule 40 exemption, relied heavily on this Florida decision. In addition, because Icelandair recently has inaugurated a service into Orlando, Florida, Iceland considers it appropriate to express to you, and to request your assistance in presenting, The Republic of Iceland's support of appellant LACSA and its opposition to the imposition of local taxes on international air traffic.

The history of agreements and treaties between The Republic of Iceland and the United States of America relating to the commerce between our two nations has been characterized by mutual cooperation toward a common goal, a stable economic environment:

(a) The Air Transport Agreement of 1945, based on the International Civil Air Conference held in Chicago, Illinois of 1944, exempted aircraft fuel from import custom duties and use or consumption duties for flights into or over our respective nations.

(b) In 1962, an Agreement was entered into granting relief for double income taxation on the earnings from the operation of ships and aircraft operated under the laws of our respective nations.

(c) In 1975, a Convention was entered into for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital of our citizens and the businesses of our respective nations. Article 10 of the Convention specifically exempted from income taxation the "operation in international traffic of ship or aircraft" regis-

tered in our respective nations. In addition, pursuant to Article 17, Iceland agreed that its national capital tax, which has no counterpart in the United States Federal Tax Codes, would not be levied against ships, aircraft and other assets pertaining to the operation of such ships and aircraft.

(d) Lastly, on November 6, 1984, the United States Treasury Department certified the Iceland's exchange of information program for the new Foreign Sales Corporation provisions of The United States of America Tax Reform Act of 1984. We understand that these provisions may further strengthen the economic ties between our two nations.

The Republic of Iceland is concerned that its ability to function economically under its international tax and trade agreements with the United States of America has been, and may continue to be, threatened by the actions taken by local taxing authorities in the United States of America:

(1) Both The Republic of Iceland and the United States of America intended that the Agreements and Treaties would promote trade and commerce. However, as long as individual States and other local authorities assess taxes on the international commercial operations of Icelandair and other foreign carriers, such operations become more expensive. Indeed, if international air carriers such as Icelandair are forced to seek destinations in the United States of America based in any way upon considerations of local taxation of operational essentials such as aviation fuel, the States imposing such taxes, such as Florida and Illinois, may lose the sizeable financial benefits to local, state and regional commerce which naturally result from such international traffic.

(2) Local taxation of international commerce is inconsistent with and violates the reciprocity intended by our Agreements and Treaties. Local taxation prevents the Government of the United States of America from uniformly conducting its relationships with foreign governments. This lack of continuity undermines those relationships.

The Republic of Iceland hereby formally requests that The United States of America consider filing an *amicus curiae* brief in opposition to the State of Florida taxation of aviation fuel used in international aviation. We understand that such brief must be filed prior to January 10, 1985, which we understand is the current deadline.

The Embassy of Iceland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 18, 1984.

EMBASSY OF ISRAEL
WASHINGTON, D.C.

The Embassy of Israel presents its compliments to the Department of State and has the honor to request its assistance in the following matter.

In June 1984, the Supreme Court of the State of Florida held in a lawsuit involving Lineas Aereas Costarricenses and eleven other foreign carriers ("LACSA litigation") that the State's 5.7 cents per gallon sales tax on aviation fuel is valid. According to information given to the Embassy of Israel, the decision of the Florida Supreme Court is being appealed to the United States Supreme Court.

The Government of Israel wishes to express its strong concern with respect to the decision of the Florida Supreme Court. In addition, the Government of Israel wishes to express its interest in the outcome of the LACSA litigation in the United States Supreme Court.

El Al Israel Airlines Limited ("El Al") is the flag carrier of the State of Israel and is over 99% owned by the Government of Israel. El Al has been designated in accordance with the terms of the Air Transport Agreement between the U.S.A. and Israel, 13.6.1950, and the Protocol relating to the said Agreement of 16.8.1978, and foreign air carrier permits issued by the United States Civil Aeronautics Board, to conduct international flight operations between Miami and foreign points. El Al has in the past engaged and may in the future engage in operations into and from Miami. While the LACSA litigation directly concerns only aviation fuel taxes imposed by the State of Florida, it also has wider im-

plications for international airlines, such as El Al, that serve the United States.

It is the view of the Government of Israel that taxes such as the Florida aviation fuel tax on foreign carriers are in conflict with the principle that international air carriers should be exempt, [a] principle [that] has, for many years, been well established by international treaties and agreements to which the United States is a party.

The United States and the State of Israel are signatories to the Convention on International Civil Aviation (Chicago Convention). Article 24 of the Chicago Convention provides that fuel and aircraft stores on board an aircraft of a contracting state shall be exempt from customs duty, inspection fees or similar national or local duties and charges in the contracting states.

In addition, the International Civil Aviation Organization ("ICAO"), adopted on November 14, 1966, a Council Resolution, in furtherance of Article 24 of the Chicago Convention, which enunciates ICAO's policies on taxation in the field of international air transport and which provides, in part, that when an aircraft registered in one state departs from an international airport of another state, the fuel and other consumable technical supplies taken on board for consumption during the flight shall be exempt from all customs and other duties. The definition of "customs and other duties" set forth in that Council Resolution includes sales, consumption and internal duties and taxes of all kinds levied upon fuel by any taxing authority within a state. The United States has in general accepted the principles enumerated in the ICAO Council Resolution and does not itself impose any such charges. However, some states in the United States, for example, Florida, do

impose such charges. The Government of Israel considers taxes such as the Florida aviation fuel tax to be inconsistent with the aforementioned Resolution.

Moreover, paragraph (c) of Article IV of the Air Transport Agreement of June 13, 1950, between the United States and Israel provides that fuel and aircraft stores retained on board civil aircraft of the designated airline of one contracting party shall be exempt from customs, inspection fees or similar duties or charges in the territory of the other contracting party. This provision is not confined to national charges. It demonstrates the understanding as [between] our two countries of the need for reciprocal exemption from taxes on civil aviation, which would be seriously undermined by the imposition of local fuel taxes by any state of the United States.

Pursuant to paragraph (g) of Article 10 of the 1978 Protocol to the Air Transport Agreement, each party agrees to use its best efforts to secure for the designated airlines of the other party, on a reciprocal basis, an exemption from taxes, charges and fees imposed by state, regional and local authorities on, among other things, aircraft fuel and stores. The State of Israel has no taxes similar to taxes such as the Florida aviation fuel tax. Thus, American-owned airlines operating to and from Israel are granted full exemption from purchase-taxes similar to those imposed by the State of Florida.

The Government of Israel wishes to affirm its position that exemption from taxation on aviation fuel is granted on a basis of reciprocity and would consider the Florida sales tax a deviation from that principle.

It is, therefore appropriate for the State of Israel to request that the United States support the posi-

tion of the international airlines in the LACSA litigation and that the Department of State undertake to transmit the concerns of the State of Israel to the United States Supreme Court.

Dec. 5, 1984

AMBASCIATA D'ITALIA
WASHINGTON, D. C.

The Italian Embassy presents its compliments to the Department of State and wishes to draw its kind attention on the following matter.

Since April 1, 1983, the State of Florida has been applying a five percent sales tax on jet fuel purchased within the State, even by foreign carriers. It seems that the State of Illinois is also about to impose the same amount of tax on fuel purchases, even though foreign carriers have made juridical appeal against the Florida decision and are awaiting the decision of the Supreme Court of the U.S.

Article 3 of the current Civil Aviation Agreement, [like] those signed with many other European countries and Japan, guarantees on the basis of reciprocity the total exemption from import duties, charges and any other tax applied on fuels.

The Italian Embassy understands that the above agreement has not been ratified by the U.S. Senate and that, consequently, the single States maintain their right to autonomously apply such sales taxes in their territories. However, the Memorandum of Understanding, signed by the U.S. Government with various countries aimed at rectifying the conflict of interests between the Federal Government and the States of the Union, guarantee to the countries which signed the Memorandum the U.S. government's support and the application of the non-discriminatory clause (Most Favorite Nation).

In view of the above, and since Italy does not apply any sales taxes to U.S. aircraft re-fueling in Italy, the Italian Government would appreciate it if the Department of State would use its good offices in

order that the appropriate U.S. authorities will rectify the situation as soon as possible.

The Italian Embassy welcomes the opportunity to renew to the Department of State the expressions of its highest esteem and consideration.

Washington, D.C.
October 2, 1984

EMBASSY OF JAPAN
WASHINGTON

January 11, 1985

The Embassy of Japan presents its compliments to the Department of State and, with regard to the recent development in the state of Florida in imposing a tax of 5.7 cents per gallon on aviation fuel sold and loaded in the state for the purpose of international air transportation from April 1983, wishes under instruction from its home Government, to request the Government of the United States to take appropriate measures so that the fuel for use in international air transportation in the state of Florida will be exempted from tax in view of the following points:

(1) Article 6 of the Civil Air Transportation Agreement between Japan and the United States holds that both parties shall be exempted from sales tax on such goods as fuel and lubricating oils for the use in international air transportation purchased and loaded in the other party's territory on the basis of reciprocity;

(2) In the resolution of the International Civil Aviation Organization (ICAO), it is provided that such a fuel tax as that by the state of Florida should be eliminated on the basis of reciprocity. Therefore, the Government of Japan regards such taxation by the state of Florida as inconsistent with this Resolution;

(3) The Government of Japan believes that in encouraging development of an international exchange of people and commerce, it has become an internationally established practice to exempt [from] tax fuel used for the purpose of international air transport.

The Government of Japan wishes to point out that Florida's sales tax on such fuel impedes the sound development of international transportation.

Moreover, the Embassy wishes to call to the attention of the Department of State a similar appeal made on December 9, 1983, in response to the imposition of a similar kind of sales tax by the state of Illinois, and further to the action of Latin American airlines challenging the right of the state of Florida to impose such a tax through a lawsuit, which is currently under review by the United States Supreme Court.

The Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

[EMBASSY OF MEXICO]

[*Unofficial Translation*]

The Embassy of Mexico presents its compliments to the Department of State and would like to call its attention to the following matter.

The State of Florida established a tax of 5.7 cents per gallon on all aviation fuel sold in its territory from April 1st. 1983 onwards. For this reason, a group of airlines, including Mexicana and Aeroméxico, brought the case to a State court which ruled that foreign air-freighters operating in the State of Florida should be exempted from the aforementioned fuel-tax. However, the administrative State Government authorities of Florida appealed this decision to the State Supreme Court, which reversed the lower court ruling, endorsing the right to levy taxes on the fuel used by international airlines. Consequently, the airlines affected decided to appeal to the Supreme Court of the United States. The case is known as "Líneas Aéreas de Costa Rica, S.A. (LACSA) et al. vs. Department of Revenue, State of Florida."

This Embassy would like to express the serious concern of the Government of Mexico over this situation, since it is of the opinion that the decision made by the State of Florida is in disagreement with the contents of article 7 of the Agreement in force between the Governments of the United Mexican States and the United States of America on the subject of air-transportation. This measure is also inconsistent with the provisions of the Chicago Convention and the resolutions of the International Civil Aviation Council, specifically that of November 4, 1966 (ICAO document 8632-C/968). Moreover, this Embassy considers that if the legality of the fuel-tax levied by

the State of Florida were to be sanctioned, this would result in problems of multiple taxation.

Because of the aforementioned reasons, the Embassy of Mexico request, through the mediation of the Department of State, the support of the Government of the United States for the case of the airlines in question to be tried by the Supreme Court of Justice, suggesting for this purpose to use an *amicus curiae* procedure. It is the understanding of this Embassy that the deadline for the Department of Justice to act as *amicus curiae* would be January 10, 1985.

The Embassy of Mexico avails itself of this opportunity to convey to the Department of State the assurances of its kind consideration.

Washington, D.C. December 11, 1984.

[EMBASSY OF THE NETHERLANDS]

EA-14184

The Royal Netherlands Embassy presents its compliments to the Department of State and has the honour to request the Department's attention to the following.

The State of Florida imposed, effective April 1, 1983, a tax of 5.7 cents per gallon on all aviation fuel sold within its jurisdiction. Under this legislation, all fuel purchased in Florida is taxable, even if it is consumed outside of that state or, indeed, outside of the United States.

Lineas Aereas Costarricenses, S.A. and other foreign air carriers from the Caribbean and Central and South America filed a lawsuit in the Florida courts challenging the legality of this Florida state tax under the United States Constitution. On June 1, 1983, the court before which the initial hearings on this lawsuit were held issued a decision concluding that foreign carriers serving Florida must be exempted from this tax. The State of Florida appealed this decision to the Florida Supreme Court, which on June 14, 1984 reversed the lower court's determination and held that imposition of the tax on international airlines is proper. The plaintiffs have appealed the decision of the Florida Supreme Court to the United States Supreme Court.

The Royal Netherlands Embassy wishes to inform the Department of State of the grave concern of the Netherlands Government with regard to the aforementioned imposition of an aviation fuel tax by the State of Florida on international aviation. In this context, the Government of the Netherlands would

like to observe that said tax is inconsistent with the Air Transport Agreement between the Government of the United States of America and the Government of the Kingdom of the Netherlands of April 3, 1957, Article 7 (d) of which states that "fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one Contracting Party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes and charges, even though such supplies be used or consumed by such aircraft on flights in that territory".

The Netherlands Government is of the opinion, furthermore, that the referred Florida state tax is contrary to the established international standard of reciprocity. More specifically, reference may be made to the Resolution of the Council of the International Civil Aviation Organization of November 14, 1966, in particular Section I, paras. 1 and 4 thereof, which stipulate that "when an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State of for the territory of any other State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties". "The expression 'customs and duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon fuel, lubricants and other consumable technical supplies by any taxing authority within a State".

The Netherlands Government has consistently manifested its opposition to any infringement of the

principle that international aviation should be exempted from taxes or other impositions. The Florida state tax under reference, if maintained, would not only be highly undesirable in itself from this point of view, but would, moreover, constitute a precedent for possible similar action by other foreign governments.

The Netherlands Government has been informed that the aforementioned plaintiffs will soon present their case to the United States Supreme Court. For the reasons set out above, the Netherlands Government urges the Government of the United States to give formal support to the position of the plaintiffs in this litigation by filing an *amicus curiae* brief to that effect with the United States Supreme Court. It is the understanding of the Netherlands Government that the deadline for submission of said brief in this case is presently set at January 10, 1985.

The Royal Netherlands Embassy, whilst thanking the Department of State for its attention to this important matter, avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.
December 3, 1984

ROYAL NORWEGIAN EMBASSY
WASHINGTON, D.C.

The Royal Norwegian Embassy, acting also on behalf of the Royal Danish Embassy and the Swedish Embassy, presents its compliments to the Department of State, and has the honour to draw the attention of the Department to the following matter:

The State of Florida on 1 April 1983 imposed a 5.7 per cent sales tax within the territory of its jurisdiction on jet fuel purchased by foreign airlines for international transport. The legality of this decision has since been challenged by a number of foreign airlines serving the US market, and the matter has been appealed to the United States Supreme Court with a request to review and reverse the decision of the State Government.

Already the action taken by the State of Florida has been referred to as a precedent by other local jurisdictions within the United States, contemplating similar measures with regard to taxation of foreign airlines.

The Governments of Denmark, Norway and Sweden have noted these developments with a growing concern. The three governments would in this context like to underline that American-owned airlines, as well as other foreign owned airlines, operating routes to and from Denmark, Norway and Sweden are in these countries granted full exemption from taxes and duties on similar purchases of fuel for international transport.

Such measures as taken by the State of Florida will not only be detrimental to the overall development of international aviation, but would also jeopardize the international consensus and standards of

reciprocity in this field, as well as the equilibrium of the taxation regime for civil aviation as now applied between our respective countries.

A further reason for the concern of the Scandinavian Governments is the possible effect such an action might have on other countries which might follow suit, with the ensuing apparent risk of seriously damaging the fundamental principles of avoidance of double taxation of air transport companies.

The Governments of Denmark, Norway and Sweden would therefore like to express their strong concern with regard to these measures, and urge the Government of the United States to use its good offices in order that the appropriate authorities will rectify the situation.

The Royal Norwegian Embassy avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C., 11 December, 1984.

No. 106/84

EMBAJADA DE PANAMA
WASHINGTON, D.C. 20008

E.P.E.A.U. - 507 D

December 12, 1984

The Embassy of Panama presents its compliments to the Honorable Department of State and has the honor to refer to the aviation fuel taxes that have been imposed on international airlines by the State of Florida through its Senate Bill 8A, which was made effective on April 1, 1983.

The Government of Panama is deeply concerned with this matter, as the proposed taxes fall within Article III, Paragraph C of the Agreement on Air Transport Services Between the United States of America and the Republic of Panama, which was signed at Panama on March 31, 1949, which clearly indicates the following:

> "The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the annex shall, upon arriving in or leaving the areas with respect to which the other contracting party has jurisdiction, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircrafts on flights in those areas."

On the other hand, the established international consensus favors reciprocal exemption from taxes, which is expressed in Article 24 of the Chicago Convention. Also, aviation fuel taxes such as those im-

posed by the State of Florida create a substantial risk of international multiple taxation, and particularly, retaliatory measures by other nations. At the present time many international airlines are facing severe financial difficulties, and the fuel taxes will represent a serious economic burden for them.

Being that many airlines have appealed this decision to the United States Supreme Court, the Embassy of Panama would appreciate very much if the Honorable Department of State would support the position of these airlines by an "Amicus Curiae" brief to the United States Supreme Court.

The Embassy of Panama avails itself of this opportunity to renew to the Honorable Department of State the assurances of its highest consideration.

SPANISH EMBASSY
WASHINGTON, D.C.

No. 301

The Embassy of Spain presents its compliments to the Department of State and has the honor to refer to the State of Florida Senate Bill 8A, about the introduction of a Tax concerning fuel purchased by airlines.

The Government of Spain considers that the proposed taxes fall within Article 7 of the Air Transport Agreement between the Government of the United States of America and the Government of Spain of August 3rd, 1973. In particular Article 7(d) states that "Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from customs duties, excise taxes, inspection fees and other similar national duties, taxes or charges, even though such supplies be used or consumed by such aircraft on flights in that territory". This paragraph covers the taxes listed in the Notice of Proposed Amendment—which accordingly are not consistent with the Air Transport Agreement.

The Government of Spain may also refer to the Resolution of November 14, 1966 of the Council of the International Civil Aviation Organization. In particular Section 1, paragraphs 1 and 4 state that:

> "When an aircraft registered in one State departs from an international airport of another State either for another customs territory of that latter State or for the territory of any other

State, the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight shall be furnished exempt from all customs and other duties".

"The expression 'customs and other duties' shall include import, export, excise, sales, consumption and internal duties of all kinds levied upon the fuel, lubricants and other consumable technical supplies by any taxing authority within a State". Consequently, the proposals of the State of Florida are inconsistent with the aforementioned Resolution.

The Government of Spain therefore request that the Department of State urge the State of Florida to reconsider its proposals in the light of the United States obligations and commitments.

The Embassy of Spain avails itself of this opportunity to renew to the Department of State the expression of its highest consideration.

Washington, D.C., November 30th, 1984

[EMBASSY OF SWITZERLAND]

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to refer to the recent amendment of the tax law of the State of New York about franchise taxes on transportation corporations.

This new legislation, amending the tax law, will impose on airlines serving the State of New York a tax on capital stock and gross earnings, thus removing the long-standing exemption from such tax granted to foreign airlines as Swissair. The Swiss authorities are concerned about such taxation of Swissair which would be a considerable departure from the worldwide accepted principle that enterprises should be taxed only by the State in which the management of the enterprise actually is located. It would also be contradictory to the ICAO policies on taxation in the field of international air transport stated in the Resolution on taxation of the income of international air transport enterprises and on taxation of aircraft adopted by the Council of ICAO on November 14, 1966 (ICAO Doc 8632-C/968 Section III). Clause No. 1 of this Resolution provides that Contracting States shall, to the fullest possible extent, grant reciprocally exemptions from taxation on the income, property taxes and capital levies or other similar taxes.

The introduction of the new tax would be likely to cause serious problems for the aviation industry and set off a chain reaction around the world which would but add to the present difficulties of the industry.

Finally, the Swiss authorities wish to draw the attention of U.S. authorities to the fact that the fran-

chise tax of the State of New York could have the effect that different Cantons (States) of Switzerland may take the necessary steps to introduce a similar tax to counter-balance the New York legislation.

In view of the foregoing, the Swiss authorities appreciate the consideration the Department of State will give to this matter. They ask the Department of State to kindly transmit the content of this note to the competent authorities of the State of New York. The Swiss authorities trust that the tax exemption for air carriers will be restored as was done for the shipping companies.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,
March 3, 1982

EMBASSY OF SWITZERLAND

The Embassy of Switzerland presents its compliments to the Department of State and has the honor to transmit the following:

The Swiss authorities have been informed of a lawsuit currently pending before the United States Supreme Court which involves the legality under the United States Constitution of a tax imposed by the State of Florida on aviation fuel purchased by foreign airlines. In this context the Embassy of Switzerland would like to refer to its note of December 19, 1983, and make the following statement: The Air Transport Agreement of August 3, 1945, between the United States and Switzerland includes in Article 3 tax exemption clauses for introduced and retained fuel. This regulation was consistent with the practice exercised shortly after World War II. Today it is generally recognized that tax exemption is also granted for uplifted fuel. Accordingly, this established practice was enrolled in the newer bilateral air agreements as concluded by the United States and also by Switzerland.

Furthermore, the Swiss authorities wish to point out that U.S. carriers operating to and from Switzerland have never had, up to now, to pay such taxes and duties. In order to prevent discriminatory practices and to assure equality of treatment of U.S. carriers in Switzerland and of Swiss airlines in the United States, the Swiss authorities consider it necessary that reciprocal tax exemption be granted to Swiss airlines.

The Swiss authorities are concerned about the possibility of creating a precedent by confirming the legality of the Florida Aviation Tax Decision by the United States Supreme Court.

For these reasons the Swiss authorities are opposed to such taxes and would be grateful if the Department of State would submit an amicus curiae brief to the United States Supreme Court in the sense of the foregoing statement.

The Embassy of Switzerland avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Washington, D.C.,

November 30, 1984

EMBASSY OF THE REPUBLIC OF TRINIDAD AND TOBAGO

1708 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20036

The Embassy of the Republic of Trinidad and Tobago presents its compliments to the Department of State of the United States of America and has the honor to refer to the Air Transport Services Agreement dated February 11, 1946 between the United States and the United Kingdom, an Agreement dated November 22, 1961 between the United States and the United Kingdom providing for air routes between the West Indies and the United States, and an Exchange of Notes dated September 27, 1962 and October 8, 1962 between the United States and Trinidad and Tobago to continue the application of certain agreements (referenced above) to scheduled services between the United States and the Caribbean area by United States and Trinidad and Tobago airlines. Particular attention is called to Article 3(2), (3) of the first document which concerns the reciprocal exemption of each party's air carriers from the payment of fuel and certain other taxes.

It has come to the attention of the Government of the Republic of Trinidad and Tobago that the State of Florida has enacted an aviation fuel tax which is applicable to fuel purchased by both domestic and international air carriers, including Trinidad and Tobago Airways Corporation ("BWIA"), the flag carrier of Trinidad and Tobago. It is also understood that similar taxes either have been enacted or are being considered for enactment by a number of other states.

The Government of the Republic of Trinidad and Tobago wishes to express its grave concern over the application of such taxes to fuel purchased in the United States by international air carriers such as BWIA. The Government of the Republic of Trinidad and Tobago exempts United States air carriers serving Trinidad and Tobago from aviation fuel taxes and other taxes imposed at all levels of government. This exemption is premised upon reciprocal tax exemption granted by the United States to the flag air carrier of Trinidad and Tobago. Moreover, the exemption is consistent with the well-established international consensus favoring reciprocal exemption from taxes which is expressed, for example, in Article 24 of the Chicago Convention and the resolutions of the ICAO Council on this subject, dated November 14, 1966. The Government of the Republic of Trinidad and Tobago believes that the taxation of international airlines by states within the United States is inconsistent with this international standard of reciprocity as well as the standard of reciprocity which exists between Trinidad and Tobago and the United States.

The Government of the Republic of Trinidad and Tobago believes further that the taxation of BWIA by states within the United States violates the spirit if not the letter of Article 3(2), (3) of the Air Transport Agreement dated February 11, 1946 between the United States and the United Kingdom which governs air transport relations between the United States and Trinidad and Tobago. In addition to the specific exemptions set forth in Article 3(2), (3), a more general policy of reciprocal exemption from taxes of all sorts has been established between the two governments. The tax enacted by the State

of Florida constitutes a serious threat to this established pattern of reciprocal exemption.

The Government of the Republic of Trinidad and Tobago believes that true reciprocity on the part of the United States requires air carrier tax exemptions at both the federal and local levels. The failure of the United States to ensure such complete exemptions may be considered a failure of reciprocity under applicable bilateral agreements, and could moreover constitute a precedent for similar action by other foreign governments.

The Government of the Republic of Trinidad and Tobago understands that the issue of state taxation of aviation fuel will shortly be presented to the United States Supreme Court by a group of international air carriers, including BWIA. The Government of the Republic of Trinidad and Tobago is advised that participation by the United States Government in this litigation in support of the position advanced by the international air carriers will be very important, perhaps essential, in the interest of the air carrier appellants. The Government of the Republic of Trinidad and Tobago understands further that it is not uncommon for the United States Governent to join, as *amicus curiae*, the effort of private litigants in similar situations. The Government of Trinidad and Tobago urges the Department of State of the United States to give formal support to the position of the international air carriers in this litigation through the filing of a brief *amicus curiae* with the court.

The Government of the Republic of Trinidad and Tobago has no objection to the public release of this Note.

The Embassy of the Republic of Trinidad and Tobago avails itself of this opportunity to renew to the Department of State of the United States of America the assurances of its highest consideration.

10th December, 1984

WASHINGTON, D.C.

EMBASSY OF THE UNITED KINGDOM

NOTE NO 190

Her Britannic Majesty's Embassy presents its compliments to the Department of State and has the honour to refer to the sales tax on aviation fuel for use in international air transportation which has been imposed by the state of Florida. This tax was challenged by a group of international airlines in the Leon County Circuit Court which decided, on 1 June 1983, that the tax was inconsistent with the obligations of the United States Government contained in its bilateral air transport agreements, and concluded that foreign carriers were entitled to an exemption from the tax. The decision of the Circuit Court was reversed by the Florida Supreme Court without that court having had an opportunity to consider a letter from the Deputy Assistant Secretary of State for Transportation and Telecommunications expressing concern about the serious foreign relations problems that the tax would cause unless provision was made to exempt foreign airlines from it. The plaintiff airlines are appealing the decision to the United States Supreme Court.

Article 8(5) of the United Kingdom/United States Air Services Agreement provides that each contracting party shall use its best efforts to secure for the designated airlines of the other contracting party on a reciprocal basis an exemption from taxes, charges

and fees imposed by state, regional and local authorities on, inter alia, fuel supplied in the territory of the first contracting party for use in the aircraft of those airlines engaged in international air services. The United States Government will also be aware that fuel purchased in the United Kingdom and used in international transportation by the designated airlines of the United States are not assessed by United Kingdom regional or local authorities for taxation purposes. In view of these considerations, and because the Florida Supreme Court did not have the opportunity to consider the policy of the federal authorities before it reversed the Circuit Court decision, Her Majesty's Government requests the United States Government to present their views to the United States Supreme Court in the form of an amicus curiae brief, the deadline for the filing of which is believed to be 10 January 1984.

The Embassy avails itself of this opportunity to renew the assurance of its highest consideration.

British Embassy
Washington DC

10 December 1984

[EMBASSY OF YUGOSLAVIA]

No. 109

The Federal Secretariat for Foreign Affairs of the Socialist Federal Republic of Yugoslavia presents its compliments to the Embassy of the United States of America and notes with interest and great concern the information received about the intention of the State of Illinois to remove sales tax exemption on fuel and food sold to foreign air carriers on its territory.

In the simplest terms, the Yugoslav authorities object in principle to a proposal stemming from a unilateral action, which could well be in conflict with ICAO Council Recommendation as well as with the letter and the spirit of Article 7, paragraph C of the existing bilateral Air Transport Agreement between our two countries, significantly affecting financial operations of the Yugoslav-designated air carrier which currently enjoys the aforesaid exemption.

Therefore, the Federal Secretariat for Foreign Affairs urges the Department of State to take necessary steps for the mentioned intention to be withdrawn, in conformity with the international comity, and avails itself of this opportunity to renew to the Embassy of the United States of America the assurances of its highest consideration.

Belgrade, January 20, 1984

EMBASSY OF THE UNITED
STATES OF AMERICA

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